

A comparative study of the context of arbitration and the
powers and duties of arbitrators in the light of English,
French, Scottish law and the ICC Rules.

Nathalie Marie-Pierre POTIN

Submitted for the degree of PhD
Faculty of Law
University of Edinburgh
October 1997



A la mémoire de mon grand père

Abstract of thesis

The purpose of this thesis is to explore the nature of arbitration, the powers and duties of arbitrators and finally the relationships between national courts and arbitration in the light of the English, French and Scottish legal systems as well as the ICC Rules. These three ideas will be examined in accordance with the three legal systems and the ICC Rules in three consecutive parts.

In the first part, the nature of arbitration will be investigated in the light of certain methods of alternative dispute resolution (ADR) namely mediation and conciliation and compared with expertise and valuation. The purpose is to identify the nature of arbitration and this justifies the comparison with these similar concepts. This will lead to the formulation of the writer's personal definition of arbitration. In the second chapter of this first part, the definitions of the term 'arbitration', if any, will be considered for each legal system and the ICC Rules. This first part plays the role of an introductory part with a view to assisting the understanding of the reader before entering into the heart of the matter.

In the second part, the powers and duties of arbitrators will be considered. Powers are granted to arbitrators by the parties in the arbitration agreement, failing which legislation will confer certain powers on arbitrators to ensure that they can conduct arbitration in the best way possible. Procedural powers, powers of investigation, powers as to hearing, powers which ensure the good functioning of the arbitration and so on will be studied according to the legal texts and rules under study. A total of 18 powers are studied. The corollary of this is that arbitrators have to comply with some mandatory rules either imposed by legislation and international rules or by the parties to arbitration ; they are described in the following chapter. Ethical duties related to independence, impartiality, neutrality, confidentiality; duties as to the procedure; duties as to the award and several others are considered; a total of 22 duties are studied according to the texts under study.

The third part is concerned with the relationships between national courts and arbitration. The effectiveness and good functioning of the arbitral process may depend upon the good will of national courts. They may be asked to assist, support at the outset, during and at the end of the arbitral process. The national courts' intervention may occur with a view to facilitating the appointment of arbitrators, the granting of interim measures before the commencement of the arbitration, the challenge and removal of arbitrators, the granting of interim measures during the arbitral process and the recognition and enforcement of arbitral awards. The degree of assistance, support and co-operation towards arbitration is different in each country and it will be examined according to the texts under study.

Dynamism and flexibility characterise arbitration as a method for settling disputes. They have arisen from the need of actors with various legal background to collaborate harmoniously and from evolution from international arbitration practice. This research has shown that the powers and duties of arbitrators are constantly increasing and that the negative interference from national courts or institutional bodies in the arbitral process has now become a positive and effective partnership.

Acknowledgement

I am deeply indebted to my supervisor Professor Murray for his careful guidance and stimulating discussions which ensured the realisation of the thesis. I am also in debt to Professor Black whose assistance towards the thesis-writing has greatly helped me. I am grateful for the support shown and the encouragement given.

I would like to acknowledge the staff of the Secretariat of the International Court of Arbitration at the ICC especially Madame Lagacé Glain for making my internship a rewarding experience. The information and the experience acquired during my stay has improved my understanding of ICC arbitrations and has shown me how institutional arbitrations work in practice.

The execution of the thesis would have not been possible without the financial support received from the Law Faculty, University of Edinburgh and from the Foundation for Women Graduates. I wish to express my appreciation here for this support.

The thesis is also the result of the understanding shown by Madame Christiane Cooper at the IALS, University of Edinburgh, who ensured that my teaching time was adapted to the pressure of work for the completion of the PhD.

My thanks go to Mrs Helen Leslie and Mrs Lorna Paterson who have greatly assisted me during these years towards the resolution of administrative aspects of my life within the University.

The thesis would not have been possible without the love and support received, of whichever nature it was, from my parents who learned about arbitration as much as I did. I wish to express my thank to my friends for their constant encouragement and especially Χρηστος whose personal support has been invaluable.

List of Abbreviations of Legal Journals

AMERICAN REVIEW OF INTERNATIONAL ARBITRATION : Am. Rev. Int. Journ.
ARBITRATION INTERNATIONAL : Arb. Int.
BULLETIN DE LA COUR DE CASSATION : Bulletin Cass.
BULLETIN DE LA COUR INTERNATIONALE D'ARBITRAGE DE LA CCI : ICA
Bulletin
CIVIL JUSTICE QUATERLY : Civil Just. Quat.
EUROPEAN CURRENT LAW YEARBOOK : European CLYB
INTERNATIONAL ARBITRATION REPORT : Int. Arb. Rep.
INTERNATIONAL BUSINESS LAWYER : Int. Bus. Lawyer
INTERNATIONAL CONSTRUCTION LAW REVIEW : Int. Cons. Law Rev.
INTERNATIONAL LEGAL MATERIALS : ILM
JOURNAL DE DROIT INTERNATIONAL CLUNET : JDI
JOURNAL OF INTERNATIONAL ARBITRATION : Journal Int. Arb.
JURIS CLASSEUR : Juris Class.
LA SEMAINE JURIDIQUE : JCP
LAW & POLICY IN INTERNATIONAL POLICY: Law & Policy
LES PETITES AFFICHES : Petites Affiches
LOUISIANA LAW REVIEW : Louisiana Law Rev.
RECUEIL DALLOZ : D.
REVUE CRITIQUE DE DROIT INTERNATIONAL : Rev. Crit. DIP
REVUE DE L' ARBITRAGE : Rev. Arb.
REVUE INTERNATIONALE DE DROIT COMPARE
REVUE INTERNATIONALE DE DROIT COMPARE : Rev. Int. Droit Comp.
REVUE INTERNATIONALE DES DROITS DE L' ANTIQUITE : Rev. Int. Droits Ant.
TEXAS INTERNATIONAL LAW JOURNAL : Texas Int. Law Jour.
THE ARBITRATION AND DISPUTE RESOLUTION LAW JOURNAL : Arb. Disp. Res.
Law Journ.
THE LAW QUARTERLY REVIEW : Law Quat. Rev.
ICCA YEARBOOK OF COMMERCIAL ARBITRATION : Yearbook Com. Arb.

<i>Abstract of thesis</i>	i
<i>Acknowledgement</i>	ii
<i>List of Abbreviations of Legal Journals</i>	iii
<i>Table of Content</i>	iv

Table of Content

INTRODUCTION	1
 TITLE ONE : TOWARDS A DEFINITION OF ARBITRATION	4
CHAPTER 1 : ARBITRATION COMPARED TO SIMILAR CONCEPTS	4
<i>Part 1 : Arbitration in general</i>	4
<i>Part 2 : The nature of arbitration</i>	9
<i>Part 3 : Arbitration and ADR</i>	12
<i>Part 4 : Arbitration and valuation under English law</i>	20
<i>Part 5 : Arbitration and valuation under Scots Law</i>	24
<i>Part 6 : Arbitration and expertise under French Law</i>	27
<i>Part 7 : Conclusion of chapter 1</i>	32
CHAPTER 2 : WHAT ARE THE DEFINITIONS OF ARBITRATION IN THE LEGAL SYSTEMS UNDER STUDY AND THE ICC RULES ?	33
<i>Part 1 : English Law and its definition of arbitration</i>	34
<i>Part 2 : French Law and its definition of arbitration</i>	38
<i>Part 3 : The ICC Rules and its definition of arbitration</i>	43
<i>Part 4 : Scottish law and its definition of arbitration</i>	45
<i>Part 5 : Conclusion of chapter 2</i>	52
 TITLE TWO : THE POWERS AND DUTIES OF ARBITRATORS	5
CHAPTER 1 : THE POWERS OF ARBITRATORS	52
<i>Part 1 : The sources of their powers</i>	53
<i>Part 2 : The choice of procedure</i>	53
<i>Part 3 : Kompetenz-Kompetenz</i>	61
<i>Part 4 : The power to judge as amiable compositeurs according to the texts under study</i>	66
<i>Part 5 : The power to fix time limits for the submission of documents : statements of claim and defence, and counterclaim.</i>	70
<i>Part 6 : The power to choose the form of statements of claim and of defence</i>	76

<i>Part 7 : The power of 'investigation'</i>	78
<i>Part 8 : The power as to hearing</i>	91
<i>Part 9 : The power to order interim measures of protection</i>	98
<i>Part 10 : The power in case of party's default according to the texts under study</i>	103
<i>Part 11 : The power of the presiding arbitrator or oversman or umpire</i>	104
<i>Part 12 : The power to decide a claim relating to verification of a writing or falsification of a document</i>	108
<i>Part 13 : The power to issue an interim or partial award according to the texts under study</i>	108
<i>Part 14 : The power to award costs</i>	111
<i>Part 15 : The power to award interest according to the texts under study</i>	113
<i>Part 16 : The power to submit a dissenting opinion in the award</i>	116
<i>Part 17 : The power to correct and interpret award</i>	119
<i>Part 18 : The power to withhold the award in case of non-payment</i>	121
<i>Part 19 : Conclusion of chapter 1</i>	121
CHAPTER 2 : THE DUTIES OF ARBITRATORS	124
<i>Part 1 : The duties related to independence and impartiality</i>	124
<i>Part 2 : The duties whose breach amounts to serious irregularities</i>	138
<i>Part 3 : The duties as to procedure</i>	140
<i>Part 4 : The duties as to the award</i>	151
<i>Part 5 : Miscellaneous duties according to the texts under study</i>	163
<i>Part 6 : Conclusion of chapter 2</i>	175
 TITLE THREE : RELATIONSHIPS BETWEEN NATIONAL COURTS OR INSTITUTIONAL BODY AND ARBITRATION	178
CHAPTER 1 : RELATIONSHIPS BETWEEN NATIONAL COURTS OR INSTITUTIONAL BODY AND ARBITRATION BEFORE THE CONSTITUTION OF ARBITRAL TRIBUNALS	179
<i>Part 1 : The appointment of arbitrators by national courts or an institutional body</i>	179
<i>Part 2 : Interim measures before the constitution of arbitral tribunals</i>	193
<i>Part 3 : Situation where party A refers the dispute to national courts rather than to arbitration despite an arbitration agreement with party B</i>	204
CHAPTER 2 : THE RELATIONSHIP BETWEEN NATIONAL COURTS OR INSTITUTIONAL BODY AND ARBITRATION DURING ARBITRAL PROCEEDINGS	212
<i>Part 1 : The challenge and removal of arbitrators</i>	213
<i>Part 2 : Extension of deadline for rendering arbitral awards</i>	225
<i>Part 3 : Extension of deadlines in general</i>	228
<i>Part 4 : Assistance from national courts in supplementing the lack of coercive powers of arbitrators</i>	230

<i>Part 5 : Interim measures during arbitral proceedings.....</i>	<i>234</i>
CHAPTER 3 : THE RELATIONSHIPS BETWEEN NATIONAL COURTS AND ARBITRATION AFTER THE FINAL	
AWARD HAS BEEN ISSUED	239
<i>Part 1 : Challenge of awards under English Law</i>	<i>239</i>
<i>Part 2 : Challenge of awards under French Law.....</i>	<i>242</i>
<i>Part 3 : Scrutiny of awards under the ICC Rules</i>	<i>252</i>
<i>Part 4 : Challenge of awards under the Model Law.....</i>	<i>256</i>
<i>Part 5 : Conclusion of chapter 3</i>	<i>258</i>
<i>Part 6 : General conclusion of title 3</i>	<i>261</i>
<i>Part 7 : A look to the future.....</i>	<i>263</i>
 CONCLUSION OF THESIS.....	 267
 <i>Appendix 1 : ICC Data.....</i>	 <i>i</i>
<i>Appendix 2 : A comparison between arbitration, conciliation and mediation : their differences and similarities</i>	<i>viii</i>
<i>Appendix 3 : Glossary of French terms</i>	<i>ix</i>
<i>Appendix 4 : French Legislation.....</i>	<i>xii</i>
<i>Appendix 5 : List of cases</i>	<i>xxxiii</i>
<i>Appendix 6 : Bibliography.....</i>	<i>xxxix</i>

Declaration

*I, Nathalie Marie-Pierre Potin, hereby declare that this thesis is
composed of my own work.*

Introduction

There are many ways of settling disputes whether of a domestic or of an international nature. Arbitration is one of the many methods open to the parties. Some other methods are litigation in national courts, negotiation between the parties, conciliation and mediation.

Why would contractual parties¹ choose to refer potential disputes or already arisen disputes to arbitration ? Because arbitration can be beneficial to them in several ways. The parties have the opportunity to choose their own judge with specific knowledge with recognised expertise and abilities. They can choose the place of arbitration, the language of arbitration, the applicable law to the merits of the dispute and the procedural rules to govern arbitral proceedings if they wish to do so. Another determining factor favouring arbitration, as a means to settle their disputes, lies in the confidentiality usually surrounding the arbitration procedure. The adaptability of arbitral proceedings to the needs of the parties is a major asset for arbitration. The fact that arbitration can be tailor made ensures for the parties that their dispute will be considered on an individual basis with due regard to the speciality of their dispute. The last but not the least advantage is that arbitrators are normally required to be impartial and / or independent in the eyes of the parties.

Why such a choice of legal systems and rules ?

The choice of the three legal systems and of the ICC Rules lies in their interest, their recognition from the arbitration world and their impact on the arbitration practice, their background of either common law or civil law or not, and their influence upon the making and the drafting of other legal systems.

Until January 1997 when the 1996 Arbitration Act² was brought into force, the English legislation relied upon the trilogy of Acts : the 1950, 1975 and 1979

¹ For the business community arbitration has several attractions : the parties to the dispute can choose the arbitrator so they can have an expert in the field sit in judgement. This provides some comfort and there is only a short learning curve ; being able to choose the arbitrator also takes the risk out of which judge they might get in the High Court ; arbitrations allow some degree of confidentiality and it is also an attractive option when the parties are working in countries with no effective legal system ; and finally arbitration clauses can also be useful where it is difficult to reach agreement about which law should apply to govern the contract. Speech given by Mr A. Webb Business Development Director at BG plc during the Franco-British Lawyers Society 1997 Colloquium at the Town House Inverness *Justice and Money*. 11th to 13th September 1997

² Hereinafter the 1996 Act

Arbitration Acts. The 1996 Act has been in the making for approximately ten years. Its interest lies in its influence upon common law countries. Its significance arises with the refusal of the Mustill Committee to adopt the UNCITRAL Model Law³. It is therefore interesting to consider whether or not some of the principles enshrined in the Model Law were included in the 1996 Act. Although the 1996 Act does not enact the Model Law in its entirety, many provisions of the 1996 Act follow the principles developed in the Model Law. It is also interesting to see how these principles were linked and added to the principles arising from long standing English practice.

The interdependence between domestic and international arbitration is a major feature of the French legislation on arbitration. Its reform was enacted in a dual form with the 14th May 1980 decree addressing domestic arbitration and the 12th May 1981 decree dealing with international arbitration. The 1980 decree provides modern rules for domestic arbitration, while the 1981 decree codifies some more liberal rules. In the report to the Prime Minister, it has been highlighted that the 1981 reform only concern procedure and will not jeopardise the well established principles in relation to the regime for international arbitration.

The International Chamber of Commerce⁴ is a world-wide organisation which provides among many other services institutional arbitration under the ICC Rules of Conciliation and Arbitration. ICC arbitrations are peculiar and different from *ad hoc* arbitrations. The International Court of Arbitration⁵ is composed of a chairman, several vice chairmen, and around 53 members from as many nationalities as the number of ICC members (either ICC National Committee or direct members). Despite its name, the ICA is not a court in the meaning of state courts. It is an administrative body and it plays the role of the decision-taking body whereas the Secretariat of the ICA is the link between the parties to ICC arbitrations and arbitrators. The Secretariat is handling cases for the ICA and prepares them for the court sessions of the ICA with regard to the setting in motion of the case, the advance on costs and its readjustment if any, the appointment of arbitrators and their challenge if any, the selection of the place of arbitration, and the adoption of awards after careful scrutiny. The Secretariat is at the disposal of the parties or arbitrators with regard to any information they require concerning the application of the ICC Rules⁶.

³Hereinafter the Model Law

⁴Hereinafter the ICC

⁵Hereinafter the ICA

⁶Both the 1988 version and the 1998 version of the ICC Rules will be considered in this thesis.

The Scottish legislation presents another interest because the UNCITRAL Model Law has been adopted for international arbitration, and the domestic legislation is one of the oldest i.e. it dates back to the XIXth century -which is currently in the process of being reviewed. The Model Law is the result of a three years intensive work between 58 states and 18 international organisations involved in arbitration. The United Nations Commission of International Trade Law (UNCITRAL) was established in 1966 with the object of harmonising and unifying the law of international trade. The UNCITRAL adopted the Arbitration Rules in 1976, the Conciliation Rules in 1980 and the Model Law in 1985. The Scottish version of the UNCITRAL Model Law on International Commercial Arbitration has been adopted by Scotland through section 66 and Schedule 7 of the Law Reform (Miscellaneous Provisions) Act 1990 upon proposal from the Dervaird Committee.

The choice of the rules of an institution dealing with arbitration was a deliberate selection with a view to comparing institutional arbitrations with *ad hoc* arbitrations governed by either the English or French or Scottish legislation on arbitration.

The English, French and Scottish legal systems and the ICC Rules under study are the texts either in use or soon to be used when the thesis is submitted.

The purpose of this thesis is to investigate the nature of arbitration, the powers and duties of arbitrators and finally the relationships between national courts and arbitration in the light of the three legal systems and the ICC Rules. These three ideas will be considered in three different parts namely : title one, towards a definition of arbitration; title two, the powers and duties of arbitrators and title three, relationships between arbitration and national courts.

The reason for considering the nature of arbitration and providing a personal definition of the term 'arbitration' is to answer a personal question which arose when researching for this thesis. The reason for investigating the extent and the scope of the arbitrators' powers and duties is a response to the need to set limits to their mission and their status. And the reason for dealing with the intervention of national courts or the International Court of Arbitration (ICA) in the arbitration process responds to the wish to consider and investigate how national courts and the ICA may assist in supplementing the arbitrators' lack of powers or solving the difficulties encountered in the arbitration process.

Title One : Towards a definition of arbitration

Chapter 1 : Arbitration compared to similar concepts

During the course of the research, a small survey was conducted in France¹. The aim of this survey was to examine the layman's knowledge about arbitration. The question asked was :

'What does the word 'arbitration' mean to you ?'

The conclusion of the survey was that arbitration is related to sports, politics, banking or taxation. No one ever mentioned its legal aspect. It seems that the *vox populi* does not usually make a distinction between arbitration used in sports, where a third person acts as a referee, and legal arbitration. Why does such a confusion exist ?

The purpose of the first part will be dedicated to the study of 'arbitration' as a word. In the second part, the nature of arbitration will be described. In the third part, arbitration will be compared to ADR, with a particular emphasis upon mediation and conciliation. The final part will deal with the comparison firstly between valuation and arbitration in English and Scottish law, secondly between expertise and arbitration, and thirdly between legal arbitration and arbitration in the French Civil Code (CC) under article 1592 .

Part I : Arbitration in general

Generally speaking arbitration relates to several fields. In fact, in French the words 'arbitrator' and 'umpire' can be used interchangeably. This can partly explain the scope for confusion.

In sports like tennis, football or cricket, for instance, the third person acting as an umpire or referee has the recognised powers of surveillance and supervision of the rules that are to be followed during the game. An important qualification must be made. In sport, particularly in football, soccer, tennis, the referee is not chosen by the teams or players, but is appointed by an institution dealing with the sport. At this point lies another major distinction from legal arbitration. The referee is the guardian of the laws of the game, the person in charge of their interpretation and his aim is to

¹ If conducted in Scotland, the layman might say that arbitration is related to labour disputes, or tenant-proprietor disputes, or banking and financial disputes.

make the players respect them. A referee or umpire has therefore the power and the duty to give a yellow or a red card, as a means of punishment, when a player fouls so as to impede the opponent's game.

It has been suggested in a Scottish case that the sporting referee carries out a function similar to that of judges and of arbitrators². It was suggested that the sporting referee has a duty similar to the duty to adjudicate just because he keeps the rules and counts the points between opponents. Such a statement seems awkward. How can the task of adjudicating and the task of deciding a case be similar to keeping the rules and counting the points ? The fact that a sporting referee renders a decision in the light of the rules of the games can hardly amount to the task of rendering a judgement after weighing the opposite parties' contentions, considering and giving weight to evidence and rendering a decision according to the law. At first sight both tasks may look alike because in both third parties have to decide the 'case' in the light of the rules or set of rules. Both apply the rules, both render a decision in conformity with the rules, and they both judge according to their conscience. However the difference lies in the presence of a judicial characteristic for the judges' mission and the arbitrators' mission. The mission of a sports referee has nothing to do with the arbitrators' judicial mission, because the former only complies with the rules of a game rather than tell the law³.

In the French constitution of the fifth Republic, the President of the Republic must ensure that the constitution is being followed. By his arbitration, the President is the guarantor of the proper functioning of the institutions of the fifth Republic⁴. However, the arbitration carried out by the President cannot be considered as a judicial one either, because he does not apply the law⁵.

²Lord Justice Clerk Thomson said in describing the judge's function that it is 'like referees at boxing contests, they (judges) see that the rules are kept and count the points'. in *Thomson v Corporation of Glasgow* 1962 SC (HL) 36 at 52 The facts have nothing to do with the matter here. The question put before the court was whether or not on a procedural matter a claimant could amend its claim.

³Arbitration in the proper legal sense does exist as the 29th October 1975 French Act stipulates that the national Olympic committee settles the disputes between members clubs and federations. (article 14 'le comité national olympique et sportif arbitre à leur demande les litiges opposant les licenciés, groupements et fédérations'.) This kind of arbitration is then legal by its very nature. At an international level arbitration is also used by an arbitral tribunal based in Lauzanne (Switzerland) since 1983.

⁴Article 5 of the 1958 constitution

⁵'L'arbitrage utilisé au sens politique ne peut être considéré comme une application de l'arbitrage au sens juridictionnel (...) et ce même si à l'occasion de son arbitrage, le président de la République venait à trancher un conflit entre des forces politiques antagonistes. Une telle mission ne consistant pas

The above examples show that arbitration is a term widely used because it belongs to the daily vocabulary. It is probable that the term 'arbitration' and the French term '*arbitrage*' do not have the same scope. The French term '*arbitrage*' seems to have a wider scope because it is used for arbitrations which are not legal arbitration as the arbitration carried out by the President of the Republic. Thus it is obvious that both terms 'arbitration' and '*arbitrage*' cover more than legal arbitration. This is unfortunate as it often leads to a misunderstanding.

Historical aspects

The origin of this term 'arbitration' can be found in ancient Greece. Demosthenes directly mentioned arbitration in his pleading against Meidias⁶. In his pleading, Demosthenes referred to arbitration (δίαίτια) as a means to solve disputes he had against Meidias⁷. The parties were able to choose an arbitrator (δίαιτητής), mutually selected by them, and his decision was also supposed to be supreme. Aristotle referred to an arbitrator as someone deciding with equity whereas a judge decides according to the law ; therefore arbitration has been invented for equity to be applied⁸. Numerous arbitrations occurred in Greece from the 4th century BC with respect to territorial matters⁹. In Rome, arbitration has been utilised since antiquity¹⁰ as mentioned in Roman literature. It appears that arbitral justice was a world-wide institution¹¹.

In England, arbitration was a well known method of settling disputes from the 17th century mostly for commercial activities. Indeed in 1689, a statutory text aimed at 'promoting trade and rendering the awards of arbitration, the more effectual in all

à dire le droit'. C. JARROSSON *LA NOTION DE L'ARBITRAGE* 1987 p9 (Hereinafter JARROSSON 1987)

⁶J. HUMBERT & L. GERNET *DEMOSTHENE PLAIDOYERS POLITIQUES* volume 2 1959 p47 (Hereinafter HUMBERT & GENET 1959)

⁷There was a long standing dispute between Demosthenes and Meidias. For more information, see the introduction of the book HUMBERT & GERNET 1959

⁸'L'arbitre vise à l'équité, le juge à la loi ; l'arbitrage a été inventé pour que l'équité soit appliquée'. ARISTOTE *RHETORIQUE* I.13.1374b 420

⁹For instance : 'The arbitration between Itanos and Hierapytna, two cities on the island of Crete (then known as Candia) goes back to the 2nd century before Christ. The subject matter was certain land claimed by both' (...) The exact date of the beginning of the arbitration between Itanos and Hierapytna has long been disputed. The process seems to have extended over many years. (...) The facts of the case and the awards were found recorded on two pillars : one discovered at the place of the victorious party Itanos, the other located in the market place of the venue of the arbitration Magnesia'. O. GLOSSNER in *HOMMAGE A F.EISEMANN* in Arbitration, a Glance Into History 1978. 19

¹⁰With the *arbitrium liti aestimandae*, an arbiter established the compensation sum owed by the culprit after the judge had returned his verdict of guilty. A. MAGDELAN Aspects arbitraux de la justice civile archaïque à Rome in Rev. Int. Droits Ant. 1980. 205 to 281

¹¹It was also found in the Far East

cases, for the final determination of controversies referred to them by merchants and traders or others, concerning matters of account of trade or others matters'¹². In spite of this positive approach, the reality was rather dimmer because arbitration was often defeated by either the parties themselves in revoking the arbiter's authority or by English courts which often viewed arbitration with jealousy and suspicion¹³. Commercial men manifested a significant preference for arbitration rather than for courts¹⁴ as a means for settling their dispute.

In France, arbitration was first mentioned in the 16th century. François II¹⁵ imposed arbitration for resolution of commercial disputes that arose between merchants¹⁶. With this 1560 Edict, arbitral agreements were binding and appeal against an award was made harder¹⁷. In contrast to the favour manifested by the royal authority, French parliaments were hostile to arbitration which was seen 'as encroaching on their jurisdiction and threatening their income'¹⁸. After the French revolution, arbitration won acclaim¹⁹. During the period of the Revolution, arbitration seems to have had the same characteristics as the current legal arbitration. It was already used as a means of settling disputes. The French Revolution also viewed arbitration as the most reasonable device for the termination of disputes arising between citizens²⁰.

Arbitration has been practised, in Scotland, since the 13th century when it was firmly established²¹, before the establishment of public courts²². During medieval

¹²J.M. BELL *TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND* 1877 p8 (Hereinafter BELL 1877)

¹³Judges tended to be hostile towards arbitration. Indeed traces of judicial hostility to arbitration are to be found in judgements well into the second half of the 19th century. in J. PARRIS *ARBITRATION : PRINCIPLES AND PRACTICE* 1983 (Hereinafter PARRIS 1983)

¹⁴M. MUSTILL & S. BOYD *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 1989 p33 (Hereinafter MUSTILL & BOYD 1989)

¹⁵François II ran France between 1559 and 1560. He was influenced by the Guise Family which favoured the struggle against Protestants.

¹⁶By the 1560 Edict.

¹⁷R. DAVID *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 1985 p88-89 (Hereinafter DAVID 1985)

¹⁸DAVID 1985 p89

¹⁹J.J. CLERE *L'Arbitrage Révolutionnaire : Apogée et Déclin d'une Institution* in *Rev. Arb.* 1981 p3 at 7

²⁰Article 1 of the 1790 Edict.

²¹R. HUNTER *THE LAW OF ARBITRATION IN SCOTLAND* 1987 p23 (Hereinafter HUNTER 1987)

²²*STAIR MEMORIAL ENCYCLOPAEDIA THE LAWS OF SCOTLAND* Volume 2 1988 p130 (Hereinafter *STAIR ENCYCLOPAEDIA* 1988 Volume 2)

times²³, arbitration was a method of settling disputes between and among members of kin groups (e.g. a bond of friendship between the members of the Murray family provided that Sir W. Murray of Tullibardine and eight others should judge all disputes of civil and criminal matters between members of the name). Any kind of dispute, from assault to homicide, was dealt with by arbitration. In the 17th century, arbitration was generalised after Charles I invaded many patrimonial interests including those of the greatest Scottish families, and an arbitral solution was proposed to solve the extreme disorder caused throughout Scotland consequent to Charles I's actions²⁴. Not long after, the 1695 Articles of Regulation were passed which was the real birth of modern arbitration in Scotland.

The International Chamber of Commerce was founded in 1919 and it adopted its first set of rules in 1922. In 1923, the International Court of Arbitration was founded. Since that time, the ICC has handled a huge volume of cases²⁵ with a wide range of parties from companies, governments, governmental agencies, and with arbitrators originating from many countries. The typical subject matter of ICC cases was identified²⁶ as follows : foreign trade, licensing, joint venture and industrial co-operation, construction, agency, finance and others such as maritime transport, consultancy and employment.

Despite the difference in origin and the difference in the nature of disputes referred to arbitration, arbitration was customarily used in the past centuries, as shown above. In France and in Scotland, arbitration was utilised for a wide spectrum of disputes whereas at that time in England, arbitration was rather limited to commercial disputes. Arbitration was once very popular and later lost its attraction. However, it has regained the lost field and it is developing. Arbitration can obviously offer an interesting alternative to national courts.

Conclusion

In this part, it has been shown that arbitration is a commonly used word. The confusion previously observed with the term 'arbitration' has its foundation in the fact

²³Till the 1672 Reform which led to the collapse of the traditional arbitration by members of kin. The reason is to be found in the refusal of the courts to accept any longer the withdrawal from their jurisdiction of the issues between the complainer and alleged wrongdoer to be settled . HUNTER 1987 p42

²⁴BELL 1877 p11

²⁵Please refer to Appendix I

²⁶CRAIG & PARK & PAULSON *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 1990 p9 (Hereinafter CRAIG & PARK & PAULSON 1990)

that it is frequently used to describe dissimilar concepts i.e. sporting activities, legal arbitration, arbitration carried out by the French President and others. It can therefore be said that the term 'arbitration' is abused, because it is used for things or concepts which are not always directly connected to legal arbitration. This would explain why its meaning has been unsettled. Thus, it can be said that the term 'arbitration' is too customarily used. That is why it is found in many fields without any links to the legal arbitration, which is the topic of this research.

Part 2 : The nature of arbitration

The purpose of this chapter is to clarify the meaning of arbitration in a legal sense. It is a difficult thing to do due to the ambiguity surrounding the term. The definition must enclose the term in some notional boundaries so that the exact concept of what arbitration is and what it is not can be perceived.

The idea of arbitration is closely connected with 'private justice'. It is a private justice in the sense that arbitration is conducted by a private person²⁷ who is chosen either by the parties or by some mechanism for selecting an arbitrator²⁸. The word 'private' has two connotations of interest : private as opposed to 'state justice' and private as opposed to 'not public'.

The word 'private' implies that the selected person does not occupy a state position²⁹ but acts as a private person who is asked to decide the case put before him. As his office originates from the parties to arbitration and not from the state, his jurisdiction and powers are limited accordingly. An arbitrator does not have coercive powers. The word 'private' also means not public, i.e. different to the direct and open access of state courts. It is private because not everybody may use it, since a contract referring a dispute to arbitration is necessary to initiate its process. Its process is usually tinged with secrecy³⁰. Its inherent secrecy is one of the reasons that the parties chose it in the first place. In this way, they can solve their quarrels without the publicity of state courts or without the potential interference of a state. The

²⁷ If a state judge is conducting the arbitration, he will not be formally dressed, he will not be sitting in a court room, there will be a different atmosphere because there will be no public attending and his decision will not be constrained by the rules of the court.

²⁸ The private person is usually paid in return of his mission. In Scotland and in England, a judge might act as an arbitrator and in this situation his fees will be paid to the state because the service is provided by the state.

²⁹ Even if a judge is appointed as an arbitrator, his task will be the arbitrator's task with his power and duties, without coercive powers and not anymore those of a state judge.

³⁰ In some Islamic countries like Saudi Arabia, anyone has the possibility to attend a hearing of an arbitration.

confidentiality of arbitration is usually and generally taken for granted³¹. The principle of confidentiality is generally accepted³² but above all, it is required by parties and is often the determining factor in their choice of arbitration to settle their disputes.

Another aspect of arbitration is its voluntary nature. Before going further, this statement must be qualified. In saying that arbitration is voluntary, it does not mean that statutory arbitrations³³ are forgotten. Many countries find that arbitration is a beneficial means of settling disputes. Consequently, arbitration has been imposed for the resolution of some specific types of disputes. Statutes may require the parties to go to arbitration rather than to go to national courts once they entered into a specific type of agreement e.g. tenancy agreement or employment agreement ; the parties do not have the choice because arbitration will be the only means of settling their potential disputes. Thus, to arbitration they must go. The recognition of statutory arbitrations should not hide one of the paramount characteristics of arbitration i.e. its voluntary³⁴ nature.

By entering into the agreement to arbitrate, the parties usually accept to have their dispute settled by arbitration. The agreement between the parties supposes that they have deliberately chosen arbitration rather than state courts when the arbitration is not imposed by law³⁵. A corollary to this is that arbitration is contractual by nature³⁶ due to its origin. This implies that the will of the parties is the corner stone of arbitration³⁷. Arbitration is also their personal product as they define its

³¹ If there is the absence of privacy it does not deprive the procedure from being an arbitration.

³² In *Australian Esso Ressources Australia v Plowman* [1994] 1 VR 1 and *The Commonwealth of Australia v Cockatoo Dockyard* 36 NSWLR 662, Australian courts do not recognise confidentiality as an essential feature of arbitration.

³³ For instance in France, arbitration is compulsory for disputes involving journalists. In England, arbitration is imposed as a method of settling disputes by the Agricultural Holdings Acts, the Buildings Societies Act 1962, the Friendly Societies Act 1974, the Industrial and Provident Societies Act 1965, the Lands Tribunal Act 1949, the Public Health Act 1936. In Scotland arbitration is used for disputes between farmers and proprietors of the land must be referred to arbitration falling under the Agricultural Holdings Act.

³⁴ But not when arbitration is compulsory and imposed by statute as the only means of solving disputes.

³⁵ See statutory arbitration imposed by legislation.

³⁶ The contractual nature of arbitration has been accepted in French law from early time. The *Cour de Cassation* has established this principle in that case in which it held that 'attendu que les sentences arbitrales qui ont pour base un compromis font corps avec lui et participent de son caractère conventionnel.' *Roses v Moller et Cie*, Cour de Cassation, 27th July 1937 in JDI 1938. 86

³⁷ 'L'autonomie de la volonté doit jouer un rôle important en matière d'arbitrage, mais comme l'a dit un éminent auteur le respect de la volonté à une limite, il doit s'arrêter là ou s'arrête la volonté elle même'. C. JARROSSON *LA NOTION D'ARBITRAGE* 1987 p149 (Hereinafter JARROSSON 1987)

characteristics. The parties voluntarily choose the arbitral process to settle their dispute by a private judge rather than by state courts. Since the parties' autonomy is a principle widely recognised and accepted³⁸, the parties are thus allowed to choose arbitrators granting them jurisdiction to solve a dispute by virtue of the arbitral clause. The parties can also choose the law applicable to their contract. The doctrine of autonomy has gained extensive acceptance³⁹ and this is proven by the numerous references made in common law countries, civil law countries⁴⁰ and socialist countries⁴¹ as well as in international conventions⁴². The principle is subject to limitations⁴³ in some legislation.

Arbitration is a tailor made resolution of disputes since the parties can choose their arbitrators or sole arbitrator, their place of arbitration, the language, and the procedure governing arbitral proceedings. Failing that arbitrators will choose the procedure, the place of arbitration, the language of arbitration, and the procedure governing arbitral proceedings as they deem appropriate. Arbitration is therefore appreciated for its flexibility, its adaptability to the circumstances of the case, to the needs of the parties, and to the nature of the subject-matter.

The third party in charge of solving the dispute is chosen for his impartiality and his independence if both qualities are required. The person derives his jurisdiction from the arbitral agreement. In order to have a judicial nature, the arbitrator's decision must settle an existing dispute. And by doing so, he does really carry out a similar function to that of a judge, as he finally determines the merits of the case⁴⁴. The only difference lies in the origin of the powers granted to him. An arbitrator is directly granted powers by the arbitration agreement and the parties. Arbitration has thus a private origin whereas the power granted to a judge emanates

³⁸Except Sauser Hall, Mann who both questioned this principle and considered that the parties are free to a certain extent because the conflict of law rules of the *lex fori* have to be complied with.

³⁹A. REDFERN & M. HUNTER *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1991 p97-98 (Hereinafter REDFERN & HUNTER 1991)

⁴⁰Since the 14th May 1980 decree, French Law on arbitration recognises the contractual nature of arbitration. It grants a real freedom to the parties and arbitrators as to the procedural aspects of arbitration, despite mandatory rules that should be abided by.

⁴¹'Despite their differences, common law, civil law and socialist countries have equally been affected by the movement towards the rules allowing the parties to choose the law to govern their contractual relations'. REDFERN & HUNTER 1991 p98

⁴²The Model Law stipulating that arbitrators shall apply the law designated by the parties as applicable to the substance of the dispute in article 33(1). The 1961 European Convention providing that 'the parties shall be free to determine by agreement, the law to be applied by the arbitrators to the substance of the dispute' in article VII.

⁴³Imposed by mandatory rules of each country.

⁴⁴Facts finding may not be an issue of the arbitration, arbitrators may not always do it.

from the State⁴⁵. The judicial nature of an arbitrator's mission is generally recognised as expressed by article 2§1 and 2§3 of the 1958 New York Convention. To have a judicial nature, the arbitrator's decision must be binding upon the parties. The arbitrator's decision must be accepted, respected, obeyed and finally executed by the parties to the agreement otherwise they may incur sanctions and may be obliged, by a national court decision, to perform what the final award imposes. The parties will have to comply with the award. Here lies the difference between arbitration and Alternative Dispute Resolution.

Conclusion

In this part, the nature of arbitration has been investigated, and its major features have been described. Arbitration has the following features : it is a private form of justice, its origin is voluntary and is then based upon the parties' consensus to refer their disputes to arbitration. Arbitration is a tailor made type of dispute resolution that can be adapted to the need of the parties and to the circumstances of the case. Finally, arbitration is, in theory, a confidential method that is carried out by an impartial and / or an independent third party with the view to rendering a final and binding decision. If for any reason, a characteristic described above is absent, it does not necessarily prevent the procedure from being an arbitration. As seen above a qualification can always be made to every characteristic described. The purpose is to give an idea of the major characteristics of arbitration. To complete its description, arbitration will be compared with ADR.

Part 3 : Arbitration and ADR

What is ADR ?

Arbitration can be assimilated to Alternative Dispute Resolution (ADR)⁴⁶ but with some precautions. The ADR acronym⁴⁷ is a term which usually refers to alternative methods to court litigation such as negotiation, conciliation, mediation, arbitration⁴⁸, mini-trial, and summary trial. The spirit behind the impetus given to the

⁴⁵The specific characteristics of the arbitrator's power will be studied in chapter 1 of title two.

⁴⁶ADR is 'a range of procedures which serve as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes, but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution' H. BROWN & A. MARRIOTT *ADR PRINCIPLES AND PRACTICE* 1993 p9 (Hereinafter BROWN & MARRIOTT 1993)

⁴⁷Dr Mackie it is an inappropriate acronym in K. MACKIE (edition) *A HANDBOOK OF DISPUTE RESOLUTION : ADR IN ACTION* 1991 p3-5 (Hereinafter MACKIE (editor) 1991)

⁴⁸Arbitration was originally an ADR but can be viewed as being closer to litigation in its approach and parts of the main stream practice leaving the term ADR to refer mainly to consensual rather than to adjudicatory processes. BROWN & MARRIOTT 1993 p9

development of ADR originates from the wish to erase court congestion⁴⁹, to enhance community involvement in the dispute resolution process, to facilitate the access to justice, and provide more effective dispute resolution⁵⁰. ADR gives the parties a better control over resolving their difficulties; encourages problem-solving approaches; also enhances co-operation and preserves the parties' relationships. What follows is a description of the resemblances and differences between arbitration, ADR, conciliation and mediation⁵¹.

In England, conciliation and mediation are often used in several fields by various private organisations. Advisory Conciliation and Arbitration Service (ACAS) is an independent body established in 1974 and was given statutory form by the 1975 Employment Protection Act⁵². ACAS deals with industrial disputes and advises both employees and employers for collective or individual disputes to be solved either by arbitration, mediation or conciliation⁵³. The individual disputes⁵⁴ between individuals and employers are usually about the infringement of rights including unfair dismissals, wage problems, sex discrimination, racial discrimination, and unlawful deductions from wages. Collective disputes⁵⁵ usually deal with salary and employment terms.

For neighbourhood disputes, community mediation centres exist, which are independent organisations existing on the basis of charitable funding⁵⁶. These centres

⁴⁹ADR offers a choice, not an echo. Realising that people are not satisfied merely by the rhetoric of the overcrowded, inefficient and unsatisfactory public court resolution system, ADR has sought to offer to individuals the opportunity to expand the horizons of justice in order to fulfil the wants and needs of the disenfranchised public'. A. THIERER *JUDGEMENT DAY : THE CASE FOR ADR* 1992 p28 (Hereinafter THIERER 1992)

⁵⁰ MACKIE (editor) 1991 p3

⁵¹ For further information refer to Appendix 2.

⁵²Section 126 A stipulating that the 'disputes between employers and workers or between workers which is connected with one or more of terms or /and conditions of employment or the physical conditions in which any workers are required to work, engagement or non-engagement or termination or suspension of employment or the duties of employment, allocation of work or the duties of employment as between workers or groups of workers, matter of discipline, membership or non membership of a trade union on the part of a worker, facilities for official of trade unions and machinery for negotiation or consultation, can be referred to conciliation, arbitration and mediation'.

⁵³During the summer 1994, ACAS has favoured the resolution of the rail track dispute. An agreement was reached on the 28th of September 1994 between Rail Track, the state owned company that runs British rail's track operations and the Rail, Maritime and Transport Union (RMT). The Economist October 1st 1994.

⁵⁴The rate of success was of 33 % in 1977, of 61% in 1988. See chapter 8 Industrial relations disputes : the ACAS role in K. MACKIE (edition)1991 p116

⁵⁵The success rate stands at just 80%. See chapter 8 industrials relations disputes: the ACAS role. in MACKIE (edition) 1991 p 108

⁵⁶See chapter 6 Neighbour disputes : Community mediation schemes as an alternative to litigation by T. MARSHALL in MACKIE (edition) 1991 p 70

deal with disputes concerning neighbourhood matters such as property boundaries, noise, car parking, and disagreements between landlords and tenants.

Both family conciliation and family mediation⁵⁷ aim at helping the parties to make decisions and reaching agreements concerning children and solving the property and financial issues consequent to a divorce. Any agreement concerning children must comply with the standards set forth by the law⁵⁸. The Family Mediators Association (FMA)⁵⁹ established in 1988 deals with issues arising from separation or divorce, such as child care, property division, capital payments and maintenance issues⁶⁰.

Mediation, in the field of criminal justice, aims at combining 'the concern for victims and the rehabilitation of offenders with the notion of reparation'⁶¹. It is a scheme⁶² in common law countries under which victims meet offenders in the presence of a third party, in order to give them an opportunity for discussion and to arrive at agreed terms for restitution, whether financial or by way of services to be performed⁶³. These mediators are probation officers or social workers who have been specially trained in mediation. This kind of mediation involves intensive preparation work and is usually carried out by a single mediator⁶⁴. Both parties must voluntarily participate in such a process. The offender may express his remorse, for example⁶⁵. This mediation may be used for such issues as aggravated burglary and sexual assault. It has also been used in manslaughter and murder cases between the offender and the relatives of the victim⁶⁶. Although its implementation appears to be positive⁶⁷,

⁵⁷Family mediation is also used in France, but it does not have a statute basis. Family mediation can be initiated at the parties' request or at the judge's request who may take recourse to it under article 21 of the New Code of Civil Procedure. For further details please refer to V. LARRIBAU-TERNEYRE *Faut-il régler la médiation familiale?* in JCP 1993 Doctrine 3649 p65

⁵⁸A stable home for the child with adequate, physical and emotional care. See chapter 10 family conciliation in K. MACKIE (edition) 1991 p139

⁵⁹Family mediation in Scotland (FMS) is also used. Its purpose is to promote, develop and support family mediation throughout Scotland by co-ordinating and developing the network of affiliated services to ensure mediation is available to all families requiring assistance with issues arising from separation or divorce. The FMS aim is to protect children from conflict in separation and divorce by helping parents work out their differences while still putting their children's feelings and needs first. FMS can be reached on 0131 220 1610.

⁶⁰The FMA pattern of mediation has the following stages : preliminary communications, meetings between parties, the parties' presentation, information gathering, facilitating negotiation, impasse strategies, and terminating mediation. BROWN & MARRIOTT 1993 from p191 to 207

⁶¹BROWN & MARRIOTT 1993 p218

⁶²Known both in UK and USA

⁶³BROWN & MARRIOTT 1993 p227

⁶⁴Who has been working on the case-preparation work in BROWN & MARRIOTT 1993 p229

⁶⁵One of the aims of this mediation is 'to create a realisation of the personal harm caused and to encourage the offender to accept responsibility, so that some degree of change of attitude can be expected, often quite considerable, at least in the short term'. BROWN & MARRIOTT 1993 p229

⁶⁶BROWN & MARRIOTT 1993 p228-229

its application may be questioned in cases where the parties are too emotional and too difficult to handle and not really willing to reach a fair outcome. Such mediation may appear surprising for any person from a civil law country. It would seem that any criminal law matter would be kept out of the field of ADR, since criminal disputes would normally be dealt with by state courts. This mediation is obviously not an alternative to the criminal justice, because the mediator cannot take the sentencing power of state judges. Depending upon the result of this mediation, the judge may pass a different sentence and may be more lenient if a positive outcome is reached with this mediation. Anyhow, the spirit behind it is good. If the mediation can prevent offenders from committing a subsequent offence, it will succeed in what criminal litigation cannot always do. If such a type of mediation is so successful, it should be encouraged as an alternative solution to some problems of criminal justice.

In France, both conciliation⁶⁸ and mediation⁶⁹ have been available to solve disputes in fields such as labour conflicts, cinema conflicts, financial disputes for companies and neighbourhood disputes. For individual labour disputes, conciliation is compulsory according to the Labour Code⁷⁰. For collective disputes, mediation and conciliation have won acclaim because of their success in solving thorny disputes in the car industry in the eighties and in the nineties⁷¹. For companies in financial difficulties, a conciliator may help the company chairman and the company creditors to find a compromise over the company debts⁷². Despite the good intention to solve disputes with mediation or conciliation, each was criticised for being unfaithful to the spirit of both processes⁷³ and above all because they have been almost unused and when they were used, the result was not convincing for practitioners⁷⁴.

⁶⁷BROWN & MARRIOTT 1993 p231

⁶⁸This conciliation is optional under art L523-1 the decree of 22nd January 1985.

⁶⁹This mediation can be initiated by the parties themselves, and the Minister of Labour according to article L524§3 of the Labour code. The mediator has extensive powers of investigating (article 524§2), of requiring the parties to appear in front of the court (article 524§3) and he may recommend his ideas his views to solve the difficulties.

⁷⁰Under article R516-13 and the following articles of the Labour Code

⁷¹In November 1996, a mediator was appointed by the French government to solve the truck drivers dispute which blocked the majors French cities for several weeks. After having reconcile the parties' opposed contentions, indicated the weakness and strong points of their views, the mediator was successful enough to bring to an end the dispute.

⁷²The law of the 1st March 1984 article 35§3.

⁷³Because it has the 'vision déformée qui fait du médiateur un succédané de juge d'instruction malin de conciliateur. Il est à craindre que devant de tels mediateurs (du cinéma et des conflits du travail) les parties ne se méfient. En effet il se pourrait qu'elles n'y voient pas de différence avec une instance juridictionnelle et que cette phase d'apaisement ne perde de sa spontanéité et de son efficacité'. JARROSSON 1987 p180

⁷⁴R. MARTIN Quand le grain ne meurt ... de conciliation en médiation in JCP1996. 439 at 440 (Hereinafter MARTIN in JCP 1996)

The institutionalisation of conciliation⁷⁵ took place with the 1978 decree⁷⁶. The conciliator is an employee of the Minister of Justice. His task is to settle neighbourhood disputes, such as noise disturbances, stray cats or dogs, policing and so on. He is acting as a catalyst for the settlement of the case⁷⁷. Here, the conciliator is in charge of presenting the most equitable solution to the parties. Generally, he must stay in the background as much as possible so that the parties can reach the settlement themselves. Such a conciliation has many advantages : in case of failure, it is without risk for the parties because no written documents are required⁷⁸, the parties do not have to pay any conciliation fees, any agreement reached by the parties will be recorded at the secretariat of the court and the enforcement of this agreement will be ensured in case of any difficulties by a court⁷⁹.

If these types of mediation and conciliation have obvious advantages, they have been quite unused, so far. A recent development has occurred with the 1995 statute which establishes the implementation of conciliation and mediation upon request from French courts as well as upon the wish of the parties⁸⁰. The 1995 statute and the 1996 decree⁸¹ authorise a state judge to give specific powers to either a conciliator or a mediator to solve the case in the course of the proceedings with a view to terminating them. With the parties' agreement, a state judge may refer the case to either a conciliator or a mediator when the case does not involve criminal issues or divorces.

This is an interesting move, because French legislators finally accept that conciliation and mediation can be used by state judges to put an end to the proceedings⁸². Both texts bring a strong recognition of the alternative resolutions of disputes initiated by state judges. The future will say if the judicial conciliation or mediation as well as their consensual counterparts will finally win acclaim in France as in other European countries.

⁷⁵To provide specific information, a conciliator, practising in Lyons (France) was interviewed.

⁷⁶Article 1 of the decree of the 20th march 1978

⁷⁷He has to understand the matter put before him, investigate the facts of the case, attempt to reconcile the opposing contentions of the parties, prompt them to formulate their own proposals and indicate the weak and strong points of the respective arguments of the parties.

⁷⁸As said in the administrative circular of the 27th February 1987.

⁷⁹TGI. refer to Appendix 3.

⁸⁰The law 95-125 of the 8th February 1995 and its decree 96-652 of the 22nd July 1996. For further details refer to the Appendix 4.

⁸¹There is a significant different between the 1995 statute conciliation and mediation since they are initiated by state judges and the 1978 decree conciliation which is only initiated by the parties.

⁸²P. BORRA L'utilisation de la médiation en France in Franco British Colloquium 1997

There is a major difference between the use of ADR in Anglo-Saxon countries and in continental Europe⁸³. Until recently, ADR in European legal systems, was nearly unknown and when used, a certain suspicion from the legal practitioners was apparent.

The domain of ADR has been quite limited in France until recently in comparison to England where nearly any kind of dispute can be referred to ADR. Besides, the French were not very receptive to an extensive use of ADR, because they did not trust its processes⁸⁴. The reasons are multiple and they are : the social context according to which the business community does not want to have a third person interfering in their business; the lawyers as they do not favour these means of settlement will not advise it to their clientele; and differences in civil procedure⁸⁵. It can be added that French people have not been disappointed enough with their justice system⁸⁶ to use alternative methods. The French justice is not too expensive as in other countries, the excesses of pre-trial discovery have not yet been encountered as fishing expeditions are unusual, and the interventions of experts are directed by judges which should avoid in theory the excess of the common law system. This would certainly explain why continental practitioners are not yet attracted by ADR as they do not see it as the panacea to their difficulties. But the main reason certainly lies in the lack of readiness in the French mentality because using ADR implies a new way of thinking. The French public and the French legal community in its majority do not seem yet ready to tackle such a drastic evolution. All these reasons can explain why a certain mistrust towards ADR or a certain unawareness characterised the European approach. However, this situation is apparently changing. The need for mediation or conciliation either judicially requested and / or voluntarily initiated is growing and it has been acknowledged by practitioners and scholars⁸⁷. Both the judicially requested conciliation or mediation and the voluntary initiated

⁸³ ADR is largely unknown in the civil law jurisdictions of Europe in the form which is understood in the common law jurisdictions such as the UK. BROWN & MARRIOTT 1993 p15 and O. DE WIT WIJEN talk given at conference 13th and 14th May 1996 *The Business Law And Practice of Dispute Disposal* in Edinburgh and H. VAN HOUTTE Pour ou contre l'ADR in 7 ICA Bulletin 1996. 77 at 78 (Hereinafter VAN HOUTTE in ICA Bulletin 1996) and JARROSSON Les Modes Alternatifs de Règlement des Conflits : Présentation Générale in Rev. Int. Droit Comp. 1997. 325 at 327 (Hereinafter JARROSSON in Rev. Int. Droit Comp. 1997)

⁸⁴ JARROSSON 1987 p176 to p197

⁸⁵ BROWN & MARRIOTT 1993 p15-16

⁸⁶ Of course this does not mean that the French system of justice is perfect. Apparently French people are not unhappy enough to use other methods. see VAN HOUTTE in 7 ICA Bulletin 1996. 77

⁸⁷ MARTIN in JCP 1996. 439 and M. DARMON La médiation conventionnelle : un mode alternatif de règlement des litiges in JCP 1996. 3976 at 437 (Hereinafter DARMON in JCP 1996) and VAN HOUTTE in 7 ICA Bulletin 1996. 77 and JARROSSON in Rev. Int. Droit Comp. 1997 p325

conciliation and mediation should be used more often as they offer interesting alternative to state justice like arbitration does.

The differences between arbitration and ADR

The differences⁸⁸ between conciliation and mediation and arbitration are rather obvious. Both a conciliator and a mediator try to bring the opposing parties together, but they cannot compel the parties to reach an agreement or impose their views or decisions on the parties whereas an arbitrator can⁸⁹. The purpose of mediation and conciliation is to bring the parties to a point of making a binding agreement, to resolve either in whole or in part the matter in dispute; and the ultimate power is left to the parties because they have not surrendered the power to decide. An arbitrator has the authority to make a binding decision (because the parties have surrendered the power to decide) whereas a mediator or conciliator does not⁹⁰. Both systems of ADR and arbitration have a consensual basis and rest on agreement.

Their aims differ. An arbitrator is required to determine a dispute after having investigated the facts, and received each party's contention, while a mediator and a conciliator are not required to decide but to bring the parties to a compromise. They are not required to solve the parties disputes, nor to decide the case, but they are only trying to help the parties to reach a compromise. They are just being asked to bring the parties together to discuss, to smooth out their differences. The success of both mediation and conciliation depends on the good will of the parties. The disputants must both desire some sort of agreement in order for the process to be effective. The parties choose ADR in order to maintain good business relations after the case is settled⁹¹. In addition, ADR may help to preserve or even re-establish commercial relationships. By choosing ADR rather than arbitration, the parties demonstrate concern for their business interests rather than for legal results.

⁸⁸Please refer to Appendix 2 for such a comparative study of those three methods.

⁸⁹About the enforcement of ADR process 'there is sometimes a misperception that one of the shortcomings of ADR processes is that they are non binding and consequently unenforceable (..) The true position is however of course that the non-binding quality of an ADR process continues only while the parties are engaged upon it and prior to their agreeing to settle their differences. Once they agree upon the terms of settlement of their dispute, the settlement terms are usually recorded in a form which is binding and enforceable.' BROWN & MARRIOTT 1993 p372

⁹⁰BROWN & MARRIOTT 1993 p62

⁹¹The parties to arbitration also chose arbitration to preserve their future relationships as opposed to the litigation. With litigation, the future business relations can be affected by the process.

As discussed above, resemblances and differences exist between conciliation, mediation and arbitration. It can be said that these methods of settling disputes have nevertheless close links.

Firstly, an arbitrator may carry out the conciliation of the parties⁹². The ICC Rules consider the eventuality⁹³. It states that if the parties reach a settlement after the file has been transmitted to the arbitrator, in accordance with article 10, the settlement shall be recorded in the form of an arbitral award made with the consent of the parties. The Model Law also considers such a situation in article 30-1. If during arbitral proceedings the parties settle their dispute, then the arbitral tribunal will terminate the proceedings, and if requested by the parties and not objected by the arbitral tribunal, will record the settlement in the form of an arbitral award on agreed terms. The situation, where the parties have reached an agreement after a conciliation within the arbitral process itself, is considered in both the ICC Rules and the Model Law. The settlement reached by the parties, often with the help of their arbitrator, will be recorded with the same status as an arbitral award. However, it would be better to distinguish the two processes more clearly, and to make their procedures mutually independent. The ICC Rules⁹⁴ respect the spirit, by dedicating several articles to conciliation on its own, which is probably the best way of avoiding any misunderstanding.

Secondly, the procedure of conciliation at an international level⁹⁵ is quite similar to the procedure of arbitration. In both situations, the process cannot be undertaken without the parties' agreement, whether included in their initial contract or in a special clause. Despite its non-judicial nature, the process developed for conciliation by these bodies is similar to the arbitral process. A conciliator can require the submission of evidence, or carry out a site visit ; he can ask for an informal hearing of the parties, question witnesses, seek legal or technical advice and secure fees. Besides these points, a conciliation can be the preamble of an arbitration. If the parties cannot conciliate, then they may turn to arbitration for settling their disputes, as is possible under the ICC Rules of Conciliation⁹⁶. There are strong

⁹² A particular arbitration scheme or contract may confer conciliation functions on an arbitrator. But otherwise an arbitrator surely has no role to conciliate the parties.

⁹³ Under article 17 of the 1988 Rules and article 25 of the 1998 Rules.

⁹⁴ Since January 1988 the ICC has separated its rules between the rules for conciliation and those for arbitration. (rules for optional conciliation article 1 to 11). E. SCHWARTZ *La Conciliation Internationale et la CCI* 5 ICA Bulltin 1994. 5 at 16 (Hereinafter SCHWARTZ in ICA Bulletin 1994)

⁹⁵ Proposed by the ICC, ICSID, the Model Law.

⁹⁶ Among 54 cases in conciliation received by the Secretariat of the International Court of Arbitration between 1988 and December 1993 only 14 became an arbitration.

differences of views as to whether the person who has acted as a conciliator can act as an arbitrator when the conciliation phase has failed⁹⁷. The ICC⁹⁸ proposes that 'unless the parties agree otherwise, a conciliator shall not act in any judicial or arbitration proceedings relating to the dispute which has been the subject of the conciliation process whether as an arbitrator, representative or counsel of a party'⁹⁹.

In a personal view, a conciliator or a mediator may act as an arbitrator under certain circumstances. Firstly, the parties and the third party must decide whether or not they agree for the conciliator or the mediator to be the prospective arbitrator. Secondly, if an agreement can be reached, the prospective arbitrator must deal with the case without being prejudiced, biased or influenced by what has been said in the course of the conciliation or mediation. If the prospective arbitrator believes that he cannot comply with these points he should refuse to act as an arbitrator. However, if he believes that he can do so, the parties have as an advantage the prior knowledge of the facts and issues by the prospective arbitrator. This will save time and money for the parties.

After having compared arbitration to ADR, the rest of the chapter will be dedicated to the comparison of arbitration with valuation under English law and Scottish law and with the comparison of arbitration with expertise under French law. Both comparisons will be considered in the light of their respective case-law.

Part 4 : Arbitration and valuation under English law

English case law¹⁰⁰ sheds more light on the nature of arbitration. In *Arenson v Arenson*, the Lords considered whether a valuer would enjoy immunity from being sued in negligence and on which grounds such an immunity could be granted. Consequently, the issue in question is whether an arbitrator is immune from being sued.

⁹⁷The matter is quite controversial. For Common law and Civil law practitioners, this prohibition is strict because a conciliator once involved in a case, his judgement will certainly be affected by his knowledge of the case and consequently he will not be able to consider the same matter put before him with an open mind for the arbitration. The Asiatic practitioners disagree with this strict prohibition and consider themselves as able to judge the same matter with an open mind.

⁹⁸The ICSID also forbids a person, who had previously acted as a conciliator or arbitrator, to be appointed as a member of the arbitral tribunal in any proceedings for the settlement of the dispute (under article 1(4) of the rules of procedure for arbitration proceedings).

⁹⁹Article 10 of the 1988 rules of optional arbitration

¹⁰⁰*Sutcliffe v Thackrah and others* [1974] AC 727 and *Arenson v Arenson* [1977] AC 405

Some¹⁰¹ agreed in requiring a judicial aspect in the process in question to grant the valuer such immunity, whereas Lord Kilbrandon deemed that valuers and arbitrators should not enjoy this immunity because of the origin of their appointment¹⁰² while Lord Salmon and Lord Fraser of Tullybelton were supporting the granting of immunity in certain circumstances only¹⁰³. They rather stressed the role of the arbitrator, his action, and his judicial role.

In the light of the Lords' speeches, the conclusion can be drawn that an arbitrator is immune from suit¹⁰⁴ in the same way as a judge is¹⁰⁵, because for the majority of the House of Lords, he performs a judicial function whereas a valuer does not enjoy a similar immunity unless he actually performs a judicial function. From the case, the difference appears to be clear-cut in theory, while in practice it is not so obvious¹⁰⁶. In conclusion, it is therefore clear that the quasi-arbitral functions exercised by a valuer or a surveyor are not sufficient enough for immunity to be claimed. The immunity only extends to persons exercising a judicial function, thus arbitrators can be immune from being sued.

Their Lordships were unable to set the limits of both arbitration and valuation. They nevertheless give us valuable ideas about the meaning of arbitration by comparing both the arbitrator's immunity and the valuer's immunity. The case underlines the complexity of defining arbitration. It is more convenient to give a list of its intrinsic characteristics.

In *Jones v Sherwood Computer Services Limited*¹⁰⁷, the issue was the challenging of the expert's report on the grounds that a mistake had been made. The

¹⁰¹ Lord Simon of Glaisdale considers that if the person carries out a judicial role, he is entitled to have immunity from being sued for negligence. *Arenson v Arenson* [1977] AC 405 at 425. Lord Wheatley agrees with such a requirement since there is a dispute and since its decision implies a judicial function, he is entitled to immunity. *Arenson v Arenson* [1977] AC 405 at 429

¹⁰² Since valuers and arbitrators are not appointed by the state but by the parties to arbitration, the origin of their appointment is private therefore they are not entitled to immunity. For Lord Kilbrandon, 'immunity is judged by the origin and the character of the appointment not by the duties which the appointee has to perform or his methods of performing them'. *Arenson v Arenson* [1977] AC 405 at 432

¹⁰³ *Arenson v Arenson* [1977] AC 405 at 440 and 442

¹⁰⁴ This is what the House of Lords thought at that very time : judges are not immune from suit.

¹⁰⁵ The main difference lies in the fact that the judge is a representative of the State and acts for the Crown while the arbitrator is usually chosen by the parties to whom he owes a duty.

¹⁰⁶ 'while an arbitrator and a valuer may each determine a valuation question mainly on the basis of his own skill or knowledge, it is anticipated that the former will, or at any rate may, finally make up his mind only after embarking on some form of judicial enquiry, however rudimentary and that he would be in some position to give, if he does not give, a reasoned judgement'. P. ROWLAND *ARBITRATION : LAW AND PRACTICE* 1988 p3 (Hereinafter ROWLAND 1988)

¹⁰⁷ The company Sherwood had taken over the company in which the plaintiffs were shareholders. Due to the take-over Sherwood had to issue additional shares to the plaintiffs and the

Appeal Court took the view that the report could not be challenged on the ground that mistakes had been made in its preparation unless it could be shown that the expert departed from his instructions¹⁰⁸. And the court concluded that since the expert had done what was required, the report could not be challenged by the plaintiff.

Several issues arise from this case. It highlights the acceptance by courts that a valuer may enjoy immunity¹⁰⁹. As the expert's report cannot be challenged on the ground of mistake - since no mistake has been done in its making - can this imply that the expert be immune from being sued for negligence? In theory, the expert should be immune since he did not commit a negligence. But this statement must be qualified right now because previous authority (the *Arenson* case¹¹⁰) established that a valuer cannot be immune from being sued because he does not perform a judicial function. And if the expert's report was done with mistake, then the expert would be liable for damages and the report would be set aside by the court on the ground of the mistake. If the parties decided that the expert's report will be final, conclusive and binding for all purposes, it ought to be accepted. After all, if they are willing to be bound by such a report, this is their choice and it has to be respected. If the parties had contractually chosen to be bound by that report whatever its quality, does the parties' wish prevent the court from setting the report aside¹¹¹? If it cannot be

other selling shareholders. Besides the parties agreed by a contract that 'in event of their accountants being unable to agree the amount of sales product sold (...) the matter would be referred to a third accountant (the expert) who would determine the amount of sales and provide a report stating that amount that the expert's determination would be conclusive, final and binding for all purposes'. Thus two firms of accountants (one or Sherwood and the second for the selling shareholders) were unable to agree on the determination of the price of the Sherwood shares, therefore it will be done by a firm of accountants (Coopers) acting as expert and the report shall be binding. The firm Coopers had to investigate the difference (i-e whether two categories of transaction were to be included as sales or not) and had to assess the amount of sales. Coopers submitted that report stating the amount. Subsequently the plaintiffs brought an action claiming that the expert's report was of no effect because it had not taken account of transactions which Coopers should have taken into account. *Jones v Sherwood Computers Services* [1992] 1 WLR 277

¹⁰⁸Both Balcombe L.J and Dillon L.J refused to permit the challenge to the expert's report based on the ground that mistakes had been made, and that the experts did precisely what they had been asked to do. As the experts had done 'exactly what they were asked to do' Dillon L.J. deemed that the plaintiffs' could challenge their determination of the amount of the sales'. This implies that the existence of fraud or collusion would give grounds to challenge the report. Balcombe L.J. shared the view that the experts 'did exactly what the parties had contracted they should do, no more no less, and their report for such it clearly was, cannot be impugned in the manner which the plaintiffs seek to do in the proceedings'. *Jones v Sherwood Computers Services* [1992] 1 WLR 277 at 287-290

¹⁰⁹An important qualification must be made here. The valuer did not enjoy immunity from being sued which has been the issue in the *Arenson* case and the *Sutcliffe* case. The court merely defined very restrictively the grounds upon which a competent suit against a valuer could succeed.

¹¹⁰The *Arenson* case established that a valuer cannot enjoy immunity from being sued for negligence because he does not perform a judicial role. At that time, the distinction between arbitration and valuation was clear and reasonable.

¹¹¹A. BERG Ousting the jurisdiction in 109 Law Quat. Rev. 1993. 35

challenged except on the grounds of bad faith and collusion, where is the difference between arbitration and valuation ? If the expert's report is not challenged, the courts' jurisdiction is not ousted, 'because neither in arbitration nor in expert determination is the ouster total unless special words are used to that effect'¹¹². The courts cannot be prevented from intervening in such circumstances when damage has been suffered by a party. But such intervention should not be an excuse for an abusive intervention into agreements that initially ousted the jurisdiction of the court. The court intervention should be limited to ensuring the compliance with the rules of law and the principles of natural justice.

Conclusion

In this part, the nature of arbitration has been discussed in comparison with valuation. The outcome is that the difference between arbitration and valuation are based upon the granting of immunity to arbitrators (which is based upon the judicial character of the mission¹¹³) as in the *Arenson* case. The later case law shows the limits of the challenge of the valuer's report in the *Sherwood* case. If the valuation is honestly made, it cannot be challenged, if that is what the parties have said in their contract. If it is marred by fraud and collusion, it can be challenged.

The *Sherwood* case highlights the difficulty of maintaining a strict distinction between arbitration and valuation. In a certain situation, an arbitrator may perform the work of a valuer, i.e. the determination of the price of a property, at the express request of the parties. If the arbitrator determines the price of a property, he will then carry out a mission similar to the one of a valuer. As a valuer may just assess the required price according to his own skills and expertise, he does not have to comply with those rules. Being an arbitrator implies that he has to comply with legal rules, and that this is his duty. The valuer does not have special duties to respect nor special obligations to comply with. Under these circumstances, the arbitrator's work can be similar to the valuer's one, for example when the parties do require him to assess the rent of a property. Here the clear-cut difference between arbitration and valuation presented in the *Arenson* case lessens or even disappears.

¹¹² J. KENDHALL Ousting the jurisdiction 109 Law Quat. Rev. 1993. 387

¹¹³ As valuers do not carry out judicial task, they will not be immune.

Part 5 : Arbitration and valuation under Scots Law

Scots law does also discuss the distinction between proper arbitration and valuation. If such a distinction is recognised in Scots law it may have a totally different area of application¹¹⁴ due to the distinct law in Scotland and in England.

The existence of such a distinction was asserted in *Calder v Mackay*¹¹⁵. Lord Justice Clerk Mac Donald believed that the existence of a 'distinction between a reference of price or value of the subject of the contract and a reference of a dispute' is clearly established in Scots law¹¹⁶. The reality of the distinction is asserted in clear and definite terms¹¹⁷.

In *Stewart v Williamson*¹¹⁸, Lord President Dunedin¹¹⁹ and Lord Chancellor Loreburn¹²⁰ bring support to the opposite idea that no distinction exists. If the distinction is recognised under English law, this cannot be imposed upon or be authoritative for Scots law¹²¹.

¹¹⁴D.A. GUILD LAW OF ARBITRATION IN SCOTLAND 1936 p5 (Hereinafter GUILD 1936)

¹¹⁵*Calder v Mackay* (1860) 22D SC p741. In that case, a dispute arose between a tradesman and his employer as to the value of work executed. The matter was then referred to arbiters who differed and the matter was further referred to an oversman who issued a decree-arbitral in which he assessed the value of the work done and found the employer liable to pay George Mackay the foresaid sum of £293,55. 6d sterling.

¹¹⁶*Calder v Mackay* (1860) 22D SC 741.

¹¹⁷In this case, the court insisted on the distinction by emphasising that both should be mixed and 'contrue such references carefully and strictly, because it would be highly inexpedient to allow a reference of value to a tradesman to be converted into a submission of a dispute; yet that is what is attempted to be done here in defending this decree-arbitral'. *Calder v Mackay* (1860) 22D SC 741 at 743

¹¹⁸*Stewart v Williamson* 1909 SC 1254 and 1910 SC (H.L) 47. In this case, J. Stewart, a farmer, brought an action against D. Williamson, the proprietor of the pursuer's farm as to the value of the sheep stock to be left by the pursuer on the farm at the expiry of the lease. Under the lease, the pursuer should refer the matter to the valuation of men mutually chosen with the power to name an oversman. Was this clause superseded by the provision of the Agricultural Holdings (Scotland) Act 1908 section 11.1? The tenant claimed that the statutory provisions did not apply to the valuation of the sheep stock and this was not an arbitration but a valuation. The First Division held that the valuation of the sheep stock was referred to arbitration and that consequently section 11.1 of the act applied and the value of the stock was to be determined by a single arbiter in conformity with the provision of the 1908 act. The court had to decide whether the word 'arbitration' in section 11.1 of the act covered such a reference as that in the present lease according to Scottish terminology.

¹¹⁹He took the view that the terms 'arbitration' and 'valuation' are interchangeable in use when he says that 'if you had asked one of the parties how the sheep stock was to be valued at the end of the lease, his answer almost certainly would have been by arbitration. The term is daily applied to proceedings where the only matter to be inquired into is valuation'. It thus appears that L.P Dunedin supported the idea that no distinction exists in Scots law in the context of the sheep stock valuation. *Stewart v Williamson* 1909 SC 1254 at 1258

¹²⁰He held that there are cases 'in which the difference is pointed out between the appraisalment and a strict arbitral proceedings. But, in many passages the word arbitration is used to cover all kinds of reference'. *Stewart v Williamson* in the House of Lords 1910 SC 47 at 48

¹²¹*Stewart v Williamson* 1909 SC 1254 at 1258

If the distinction did exist, this was certainly based upon several reasons¹²² i.e. the prevention of people whose expertise lay in fields other than law from deciding questions of law and the avoidance of the application of the rule which prohibited arbitration agreements without a named arbiter. But, these reasons have disappeared. Could this imply that no reason remains to justify the distinction between arbitration and valuation? If both arbitration and valuation are of similar nature, why are these concepts differentiated with two different words ? Secondly, if both concepts are alike, a common regime should be available to deal with their application. The Lords' demonstration in *Stewart v Williamson*¹²³ is of interest and particularly sound but it could be argued that such a resemblance between arbitration and valuation would make the application of the term 'arbitration' also meaning valuation very difficult. Moreover, what would be the purpose to utilise two concepts alike with two different terms; it would just create more difficulties in dealing with these concepts. Yet, it is possible for an arbiter to perform a valuation at the express request of the parties. He will still be called an arbiter but he will indeed perform a valuation and will have to assess the price of the property according to his skills and knowledge, and above all he will have to comply with his duties and obligations¹²⁴. Under these circumstances, the distinction between arbitration and valuation disappears.

The *Graham House Investments* case¹²⁵ shows a peculiar situation where the same man is asked to act as expert and as arbiter. When acting as an expert, he is asked to look at the second floor premises and assess the rent, whereas acting as arbiter he is required to follow a different mechanism. Lord Justice Clerk Wheatley refused to disqualify the arbiter from acting for something done by him, not in the course of the arbitration, but acting in another capacity in another determination¹²⁶.

¹²² HUNTER 1987 p15.

¹²³ In *Stewart v Williamson* 1909 SC 1254

¹²⁴ An arbiter must act strictly within the power and under the limits which have been laid down for him by the parties. He must act honestly and impartially, doing equal justice to the parties and not allowing to one what he denies to other. see *STAIR ENCYCLOPAEDIA* 1988 Volume 2 p153

¹²⁵ *Graham House Investment v Secretary of State for the Environment* 1985 SLT 502. In this case, an arbiter was appointed to determine the fair market rent for the first floor of office premises. On the same day, he was also requested to act as an expert in assessing the fair market rent for the second floor premises in the same building. Even if both parties were aware of this dual appointment, the tenant called upon the arbiter to resign on the ground that his decision he had reached for the second floor prevented him from dealing with the question in the arbitration with an open mind.

¹²⁶ 'at this stage when in any event I cannot be sure that the comparison, if relevant for consideration, is a weighty one and when the alleged disqualifying factor relates to something done by the arbiter not in the course of the arbitration, but done by him in acting in another capacity in another determination I am not prepared to disqualify him from acting further in this arbitration'. *Graham House Investment v Secretary of State for the Environment* 1985 SLT 502 at 505

The interest of this case is to prove that an arbiter may be asked by the parties to act as both expert and arbiter in order to establish the fair rent of offices premises.

Conclusion

In English law, the distinction between arbitrators and valuers is based upon the immunity of arbitrator and the theory was introduced in the *Arenson* case in which the court concluded that a valuer is not entitled to the benefit of immunity which is given to judges and arbitrators¹²⁷. Besides it should be remembered that both Lord Kilbrandon found it difficult¹²⁸ to establish any distinction between the arbitrators and of valuers' positions¹²⁹. As said in the *Stair Encyclopaedia*, it seems that there is no reason to doubt that the decision stated in the *Arenson* case would also be applicable to Scotland¹³⁰. The immunity of arbitrators has never been directly raised in Scottish courts¹³¹ though it has been discussed in *Mac Millan v Free Church of Scotland*¹³². The facts of the case are not of importance for our discussion but the comment of Lord Curriehill attracts attention when he deemed that 'the law unquestionably confers such an immunity (...) upon [judges] whose jurisdiction is conferred by the State. It also extends such immunity to private persons, upon whom the parties, by voluntary agreement, confer authority to adjudicate in certain matters among themselves; (...)'¹³³. Thus Lord Curriehill appeared to share the view that these persons are entitled to a certain immunity.

In conclusion, it may be said that the Scottish assumption, that the distinction between arbitration and valuation does not exist, can be justified if the situation in which an arbiter is expressly required by the parties to perform a valuation is considered. With such a postulate, the arbiter exclusively performs a valuation but he still has his duties and obligations to comply with ; the Scottish assumption can be accepted. What can be done to transform valuation into arbitration ? First, the parties must ask that the third party carries out an arbitration. Secondly, this third party must carry out a judicial work for his mission to be called an arbitration.

¹²⁷ About this case, a remark should be made : three of the five lords of appeal were Scotsmen (Lord Wheatley, Lord Kilbrandon and Lord Fraser of Tullyberton).

¹²⁸ For the reasons discussed above, the arbiter may perform a valuation.

¹²⁹ *STAIR ENCYCLOPAEDIA* 1988 Volume 2 p133

¹³⁰ *STAIR ENCYCLOPAEDIA* 1988 Volume 2 p133

¹³¹ HUNTER 1987 p16

¹³² *Mac Millan v Free Church* (1862) 24D SC 1282

¹³³ *Mac Millan v Free Church* (1862) 24D SC 1282 at 1295

Part 6 : Arbitration and expertise under French Law

Under French law, the limits of the concept of arbitration can firstly be specified with the analysis of an *expertise*¹³⁴ and secondly with a comparison between the New Code of Civil Procedure arbitration (article 1492 NCPC) and the Civil Code arbitration (article 1592 CC).

Expertise and arbitration

In theory, arbitration and expertise are dissimilar considering their natures and their spirit. Between a specialist giving an opinion and an arbitrator rendering an award binding on the parties, there are apparently no links and no resemblance. At first sight, three fundamental differences arise between arbitration and expertise. Firstly, an arbitrator is rather a judge whereas an expert is only a third party considering facts. Secondly, an arbitrator gives a opinion binding upon the parties whereas an expert gives an opinion which is not binding upon the judge who asked for it. Finally, an arbitrator settles a dispute on legal matters whereas an expert gives an opinion on facts¹³⁵. In theory, the difference is clear cut but, in practice, the boundaries are not always that clearly cut and the distinction is not always made by courts¹³⁶. The case law shows how difficult it can be for courts to distinguish expertise from arbitration¹³⁷.

To come back to our distinction, the *Cour de Cassation*¹³⁸ created confusion with a case where an expert had to evaluate the harm suffered by the policy-holder¹³⁹, which was called an arbitration. In several other cases,¹⁴⁰ the court took the view that what was in reality an expertise was an arbitration. Mr Jarrosson explained such a fact by a phenomenon of attraction exercised by arbitration¹⁴¹. For him, judges had the

¹³⁴ Refer to Appendix 3 : about *expertise judiciaire* and *expertise amiable*.

¹³⁵ JARROSSON 1987p123

¹³⁶ 'Les frontières entre les deux institutions sont floues et les critères de distinction classique aboutissent à des résultats confus'. JARROSSON 1987 p123

¹³⁷ 'Les décisions jurisprudentielles sont nombreuses, témoins des difficultés de qualification qui existent depuis un siècle et demi dans la matière. Elles couvrent surtout trois grandes catégories de difficultés. Il s'agit en fait des nominations d'experts ou d'arbitre afin d'estimer un bien, d'estimer un préjudice, ou encore de fixer une indemnité de fin de bail ou le montant d'un loyer lors d'un renouvellement.' JARROSSON 1987 p123

¹³⁸ For further information please refer to in Appendix 3

¹³⁹ *Compagnie d'Assurances la Foncière v Villain*, *Cour de Cassation*, chambre des requêtes, 7th March 1888 in D.1889. 1ère partie p32

¹⁴⁰ For example *Dame Levrain & Veuve Hamby v Epoux Ferte*, *Cour de Cassation*, chambre des requêtes, 30th January 1855 D. 1855. 1ère partie p57

¹⁴¹ 'Il semble qu'il existe une sorte de phénomène d'attraction opéré par l'arbitrage. Cela se vérifie lorsqu'on remarque que la jurisprudence ne disqualifie pas ce qui est appelé et paraît être un

tendency to look for situations which are similar to those they know best since those institutions have a judicial status defined in legal text. The problem was even more obvious when the case was about an expert who was supposed to settle a dispute with an arbitral process. Again, the court came out with a strange decision by disqualifying what could be an expertise by calling it an arbitration¹⁴². Here again, the court was over-influenced by arbitration.

In a famous case¹⁴³, a GP was chosen by the parties to act as an arbitrator in order to establish the consequences of the intoxication of Mr Meunier. The court took the view that the GP's report was a report of expertise¹⁴⁴. The Appeal Court disagreed with the view that the GP's report was an expertise¹⁴⁵. It took the view that arbitration and expertise are fundamentally distinct because one process is not a pale copy of the other one. An arbitrator is a judge chosen by the parties whereas an expert is a temporary assistant of the law. At the end of the arbitral process, an arbitrator does not become an expert but an ordinary person¹⁴⁶. Here, the Appeal Court was clear in its explanation. The Appeal Court said that the first instance court was influenced by the irrevocable characteristic of the decision which makes the difference between arbitration and expertise¹⁴⁷ due to the fact that the mission of this doctor was in the last resort. The last example is dealing with an arbitrator who was to give his view on facts¹⁴⁸.

These cases raised the question if an arbitrator necessarily carries out a judicial function. If one follows such a view, an arbitrator can exercise an arbitration by just giving his opinion about facts. Is it perfectly reasonable to assume that an arbitrator does not carry out a judicial function? The frequent inconsistencies of the case law and the amalgam done by French courts show how close and how unsettled the

arbitrage, tandis qu'elle disqualifie parfois ce qui est objectivement une expertise pour l'appeler arbitrage.' JARROSSON 1987 p126

¹⁴²*Viales v Lecasble*, Cour de Cassation, chambre commerciale, 28th January 1959 in Bulletin Cass. III Number 51 p56

¹⁴³*Meunier v Electricité de France*, Appeal Court of Lyons, 12th October 1953 in D. 1953.709

¹⁴⁴In his report, the GP deemed that Mr Meunier was partly responsible for his illness due to his drinking habits. As Mr Meunier was suffering from tuberculosis as a further aftermath to his intoxication, he went before the Appeal Court to review the first judgement and asked for a new expertise.

¹⁴⁵'Les juges ont cru pouvoir la considérer comme un rapport d'expertise'. *Meunier v Electricité de France*, Appeal Court of Lyons, 12th October 1953 in D.1953. 709

¹⁴⁶*Meunier v Electricité de France*, Appeal Court of Lyons, 12th October 1953 in D. 1953. 709

¹⁴⁷'Caractère irrévocable de la décision qui a fait la différence entre expertise et arbitrage'. JARROSSON 1987 p129

¹⁴⁸*Coffe v Garantie Mutuelles des fonctionnaires*, TGI of Paris, 2nd January 1984 in Rev. Arb.1985.88.

boundary line between arbitration and expertise can be. If using the usual factors (the existence of a dispute, the binding aspect of the award and the legal question) to establish the difference between arbitration and expertise results in these inconsistent judgements, other factors should also be looked at to establish the difference.

A better test could be the binding aspect of the decision to be given. If the parties express beforehand their willingness to comply with it then the process should be called an arbitration. This solution appears to be preferred by the ICC in the rule for technical expertise which stipulates that the expert's decision is not binding¹⁴⁹.

Conclusion

In this part, it has been demonstrated that article 1492 NCPC arbitration is different from expertise. The differences between the two concepts are based upon the judicial function of the arbitrator. But the difficulty arises when the *Cour de Cassation* says that arbitrators may have a limited judicial function in that they are just asked to assess facts. In such circumstances, the *Cour de Cassation* deems that when the arbitrator assesses something rather than renders a decision, he is not acting as an arbitrator but as an expert. A more reliable test could be the consideration of the given decision. If the decision is binding upon the parties, it can be concluded that the given decision is resulting from an arbitration, otherwise it would be an expertise.

Article 1592 CC and article 1492 NCPC¹⁵⁰

Is the arbitrator, under article 1592 CC¹⁵¹, similar to an arbitrator, under article 1492 NCPC of the 1981 Decree ? Under article 1592 CC, the third party will possibly solve the difference between the parties by proposing a price and provide a solution to complete their contract in the sense that without his intervention the contract of sale is not feasible¹⁵². The third party's intervention implies the existence of a non-agreement between the parties¹⁵³. On the other hand, the 1492 NCPC arbitrator carries out a judicial role and settles a dispute that arose out of an already existing contract.

¹⁴⁹ Article 6§3

¹⁵⁰ Article 1592 CC stipulates that 'il peut cependant être laissé à l'arbitrage d'un tiers; si le tiers ne veut ou ne peut pas faire l'estimation, il n'y a point de vente'. Article 1492 NCPC stipulates that 'est international l'arbitrage qui met en cause des intérêts du commerce international'.

¹⁵¹ It stipulates that the matter of price can be referred to arbitration of a third party. If the third party does not want to, or cannot, assess the price, there will be no sale.

¹⁵² 'Or ce tiers, malgré la qualification adoptée par le législateur, n'est pas un arbitre, car un arbitre ne peut pas plus qu'un juge se substituer aux parties pour fixer le prix. Il s'agit en réalité d'un mandataire qui reçoit ainsi des parties mission de fixer le prix de la vente'. DE BOISSESON *LE DROIT FRANCAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL* 1990 p176 (Hereinafter DE BOISSESON 1990)

¹⁵³ That is to say a lack of agreement.

The difference rather lies in the fact that the third party, under article 1592 CC, does not perform a judicial role because the two parties only disagree about something that has to do with the contract itself and the third party's intervention will help the parties to sign their contract. The major distinction relates to the executory aspect of the decision of the arbitration under article 1592 CC.

Besides the theory, let us have a look at the case law. In two cases,¹⁵⁴ a great deal of information is given on how courts viewed the distinction. They dealt with the determination of an index for a commercial lease and of share prices by an 'arbitrator' of article 1592 CC. Their interest lies in the fact that the *Cour de Cassation* tried to specify the boundaries of the arbitration under article 1592 CC¹⁵⁵.

In *Ollagon v Société Engetel*¹⁵⁶, the parties had agreed on a two-level clause¹⁵⁷. In the first step, an auditor was in charge of fixing the price of shares. In the second step, the clause referred the matter to another person for the implementation of this clause if any disagreement occurred. The two-level clause highlights the difference between the two types of arbitrations. If the first person was responsible for the determination of the price¹⁵⁸, his role was indeed to assess a price and in consequence he can be seen as an 'arbitrator' in conformity with article 1592 CC. About the second

¹⁵⁴ In the *Société Secar* case, the parties had to choose an index which the rent should be based upon. The parties disagreed about the choice of an index. The matter was referred to an arbitrator. There was rather a lack of agreement between the parties when they asked the third person to assess the index of the lease. The non-agreement was the basis for the article 1592 'arbitrator' to intervene. The third party's role was only to determine the index for a commercial lease. The *Cour de Cassation* held that such a determination was an arbitration under the terms of article 1592 CC, because this arbitrator estimates the price of the good in question for the parties. *Société SECAR v Société Shopping Décor*, *Cour de Cassation*, chambre civile 3, 9th October 1984 in Rev. Arb.1986. 263 comment Mayer.

In the *Maisons Florilège* case, Mr Dupré, representative of the company La Pyramide agreed to sell shares to Maisons Florilège. Their price was to be assessed by an 'arbitrator' and he decided that the price should be for a symbolic sum after consideration of the negative account of the company. Here, the third party was indeed acting as a proxy in conformity with article 1592 CC due to the non existence of a dispute. The *Cour de Cassation* criticised the Appeal Court's decision for not having completed its analysis and for not having drawn the right legal conclusions out of it, because it 'did not tiré de ses contestations les conséquences légales qui en découlaient'.... 'ce n'est pas la validité de la décision du tiers qui est contestée. *Société des Maisons Florilège, M Torre, Société Florilège Gamma Sud, Société SATEC Cassou Bordas v M Dupre et Société La Pyramide*, *Cour de Cassation*, chambre commerciale, 3rd January 1985 in Rev. Arb.1986. 263

¹⁵⁵ See comment of Mayer p267 to 271 in Rev. Arb.1986

¹⁵⁶ *Ollagon v Société Engetel Siemephone et autre*, *Cour de Cassation*, chambre civile1, 12th December 1984 in Rev. Arb.1986. 263 comment Mayer

¹⁵⁷ 'Qu'il était notamment prévu dans ce protocole que le prix des actions cédées devait être déterminé par un auditeur (...) étant précisé qu'une clause compromissoire était stipulée en cas de contestation sur l'exécution du protocole'. *Ollagon v Ste Engetel Siemephone et autre*, *Cour de Cassation*, chambre civile1, 12th December 1984 in Rev. Arb.1986.263 at 265

¹⁵⁸ 'Les prix des actions cédées devaient être déterminé par un auditeur'. *Ollagon v Société Engetel Siemephone et autre*, *Cour de Cassation*, chambre civile1, 12th December 1984 in Rev. Arb. 1986 p263 comment Mayer at 265

person, his role can really be assimilated to an arbitration in the sense of the 1980 decree. The two-steps clause highlights the distinction between the fixing of a price by a third person and the settlement of a dispute concerning the execution of a contract.

Some commentators¹⁵⁹ favour the existence of a dispute as the most important test for setting the boundary between arbitration of article 1492 NCPC and the arbitration of article 1592 CC. But it needs to be a genuine dispute rather than a lack of agreement between the parties to be the perfect test. Article 1592 CC implies that this evaluation will complete a contract. If articles 1592 CC and 1492 NCPC have anything in common, it is only their contractual basis for the reference of the matter to a third person. The parties' wish to have a decision that they can enforce only relates to arbitration whereas the parties will include the arbitrator's decision (of article 1592 CC) which will complete their contract. Another distinction lies in the existence of a judicial action for an arbitration. To perform an arbitration, the person in charge (an arbitrator) should perform a judicial task. Another difference is based upon the variance of regime which concerns the means to obtain their challenge¹⁶⁰. Thus the so-called arbitration under article 1592 CC is of a different nature from arbitration under Title IV of the NCPC¹⁶¹. The so-called arbitrator of the CC is acting as an expert but not as an arbitrator under the NCPC.

Conclusion

In the last section of this part, it has been shown that legal arbitration is also distinct from the Civil Code arbitration. The test for the determination of legal arbitration lies in the existence of a real dispute between the parties, while the test for the determination of Civil Code arbitration is only the lack of agreement between the parties. In the end, a further test would also be the role of the 'arbitrator'. If his role is to settle the dispute after hearing the parties, receiving their argumentation and their proofs, and stating the reasons for his decisions, then it is an article 1492 NCPC arbitration. If his role is to assess the price of goods, a building or anything else, his role will only amount to an expertise as under article 1592 CC.

¹⁵⁹ P. MAYER, his comment about the 3 cases in *Rev. Arb.* 1986 at 267-271

¹⁶⁰ Challenge of an arbitral award is only competent under the grounds set out in articles 1484 and 1502, while challenge of an auditor's decision can only occur in relation to the contract between the parties since its decision is a clause included in their contract.

¹⁶¹ 'In the eyes of French jurists this type of arbitration had nothing to do with the arbitration of a jurisdictional nature which was dealt with the Code of Civil Procedure. it is only nowadays that jurists and courts are tending to recognise the close relationship existing between the two varieties of arbitration which are frequently extremely difficult to distinguish in practice.' DAVID 1985 p90

Part 7 : Conclusion of chapter 1

After a consideration of its origin, the nature of arbitration has been studied. This was done with the intention to explain what one has to understand when reading about arbitration. It seems important to the present writer to settle the boundaries of the term 'arbitration' to avoid any confusion. It has been shown that arbitration is a commonly used word and therefore it is frequently found in the modern vocabulary. As it is too often utilised, it is sometimes misused. Some closely connected concepts are also called arbitration but these are not arbitration even if they are similar or connected.

In order to set the boundaries and limits of the term 'arbitration', it has been demonstrated that arbitration is closely related to ADR, to valuation and to expertise. But they are indeed different. In relation to ADR, the differences arise at all levels of comparison. One of the main differences lies in the roles they undertake. Arbitrators are expected to render a judicial decision, while mediators and conciliators are helping the parties to reach an agreement. Once the decision has been reached, the parties are free to disregard it. Mediators may propose some recommendations to the parties and conciliators only act as catalysts for a settlement. In relation to valuation and expertise, the main difference lies in the fact that arbitrators perform a judicial task while valuers and experts only assess the quality or an index and so on. They only study the facts and give their opinion as to the facts. They do not need to perform a judicial task for that purpose.

Why is the definition of the term 'arbitration' needed ? Even if arbitration is a term commonly used and usually known, its definition would help to better understand its nature. Hence, arbitration could be defined in the following terms :

Of contractual origin, arbitration is a voluntary¹⁶² and private¹⁶³ settlement of dispute in contrast to state justice. It is an alternative choice to the state justice which attracts the parties due to its confidentiality, its fairness¹⁶⁴, its liberty left to the parties or arbitrators / sole arbitrator in choosing procedural rules of the proceedings and because the parties can appoint their own arbitrator whose independence and impartiality should be intact in the mind of the parties. Whether or not there is a

¹⁶²It has already been acknowledged that statutory arbitrations exist. Nonetheless, the present writer is not prepared to subtract the voluntary nature of arbitration just because statutory arbitrations are in use. The voluntary nature of arbitration is a prime characteristic of arbitration and it should not be denied.

¹⁶³In the sense of different from the state justice but it is also a confidential process.

¹⁶⁴This does not mean that arbitrators are more fair than judges. The use of this word implies that arbitration should be a fair mean of settling disputes because arbitrators ought to comply with the principles of natural justice, equal treatment of the parties and so on.

hearing¹⁶⁵ allowing the parties to present their contending submissions, to state their cases, the arbitral tribunal gives a final decision with which the parties ought to comply. If they refuse, then national courts of the country, where the enforcement of the decision is sought, may be asked to compel the recalcitrant party to comply with it.

The attempt to give a definition is a dangerous exercise. It is undoubtedly extremely difficult to find a suitable definition for a term like 'arbitration'. It is thought that such a definition could be a worthwhile contribution. The given definition does not pretend to be the best one or the only one available. The purpose behind the presentation of a personal definition is to fill a gap. In studying the textbooks and the literature available on the subject it was noticed that only a few persons proposed their definitions of the term 'arbitration'. The proposed definition is an answer to the questions which were faced at that time.

After the consideration of the nature of arbitration, the next chapter will go into details of the definition of arbitration in the statutes and rules under study.

Chapter 2 : What are the definitions of arbitration in the legal systems under study and the ICC Rules ?

Most statutes do not provide an exhaustive definition of arbitration. The lack of definition is amazing at first, although understandable because such a concept should not be confined in a yoke otherwise it will lack flexibility. Defining arbitration is a difficult task. If the definition of arbitration is provided by any legislative text it will be temporary since a later text will improve it. It can be disappointing when a writer does not provide a conclusion in his story. A definition can be assimilated to a conclusion of a story. But a definition can only be given if there is a compromise about its wording. As legislators usually prefer to escape controversial matters, and as the term is well known in practice, a definition is usually not included in statutes. Considering this, it may seem presumptuous to define the concept of arbitration. What can be done is to draw its boundary lines by contrasting it with closely allied

¹⁶⁵ In some arbitrations, the parties do not have to give any proof. The arbitration and the arbitrators' mission only concern the interpretation of a contract or a clause of a contract.

concepts¹⁶⁶. Fortunately, some definitions of arbitration are found in dictionaries¹⁶⁷ and in scholars' work¹⁶⁸ or in the case-law which contains some guidelines on how to understand the concept of arbitration.

Part 1 : English law and its definition of arbitration

English law does not provide a definition of the term 'arbitration' as such, and none is contained in the Acts¹⁶⁹.

When the Mustill Committee¹⁷⁰ examined the Model Law, it recommended against its adoption¹⁷¹ for several reasons¹⁷². The main reason was that the Model Law definition of arbitration would introduce a dichotomy in the arbitration regime into English law¹⁷³. The Model Law text only applies to international commercial arbitration. As English law does not recognise different regimes for arbitration¹⁷⁴, such a dichotomy in the regime was a disadvantage for the Mustill Committee. Even if the Model Law text presents a compromise solution to the acknowledged difficulties, its definition of 'commercial' does not comply with English law¹⁷⁵. For

¹⁶⁶ See the first chapter where arbitration is compared to expertise, conciliation mediation.

¹⁶⁷ Arbitration is a 'procédure de règlements de litiges par recours à une ou plusieurs personnes privées (en nombre impair) appelées arbitres parfois même par recours à un juge d'Etat déclaré amiable compositeur par les plaideurs'. *LEXIQUE DES TERMES JURIDIQUE* 1985. 'On entend par arbitrage l'institution d'une justice privée grâce à laquelle les litiges sont soustraits aux juridictions de droit commun pour être résolus par des arbitres investis pour la circonstance de la mission de juger'. *ENCYCLOPEDIE DALLOZ* 1985

¹⁶⁸ This will be seen later in this part.

¹⁶⁹ The 1950 Arbitration Act, 1975 Arbitration Act, the 1979 Act or the 1996 Arbitration Act.

¹⁷⁰ The Departmental Advisory Committee on Arbitration Law (DAC) called the Mustill Committee after the name of its chairman Lord Justice Mustill. Hereinafter DAC will be used for the Departmental Advisory Committee on Arbitration Law.

¹⁷¹ The United Kingdom has consistently made plain its support for the Model Law project whilst emphasising that the balance of advantage is much more difficult to strike in the case of a state such as the UK which already has a highly developed and long established law and practice of arbitration, than in a country where arbitration is a comparative innovation in DAC October 1987 p4.

¹⁷² The differences between the Model Law and English law (1950, 1975 and 1979 Arbitration Acts) lie in court intervention, the appointment of arbitrators, their number and their challenge, the powers of arbitrators, the amiable composition which is still open to question, the court intervention during arbitral proceedings, the grounds for setting aside an award, and finally the reasoned award which is not required in theory but present in practice.

¹⁷³ As in France, Belgium and Switzerland for instance.

¹⁷⁴ With the exception, to the limited extent, that is consequent on to the accession of the UK to certain international conventions, the 1975 and 1979 Arbitration Acts have created a separate regime for domestic and non domestic arbitration as regards the enforcement of arbitration agreements, awards, the availability of a right to make agreements excluding the right of appeal. See in The UK and the UNCITRAL by the editors 3 Arb. Int. 1987. 281

¹⁷⁵ Indeed Order 72 of the rules of the Supreme Court defines commercial actions for the purpose of assigning them to commercial courts. Such a problem of definition as may arise in this context can be solved by the exercise of judicial discretion.

these reasons, England has always favoured a statutory regime covering both domestic and international arbitration¹⁷⁶.

No definition of the term 'arbitration' was thought to be of interest in either the draft bills or in the final text of the 1996 Arbitration Act. As B. Davenport expressed it, 'the reader will search in vain for any statement, derived from the authorities, as to the nature of an arbitration'.¹⁷⁷ The present writer agrees with the point and considers such a lack as being a real negative point for a statute. Can it be criticised for this very reason, considering that other legislators have not done much more ? Obviously, this cannot be done.

The 1996 Arbitration Act gives some definitions of arbitration related words. Section 6 of the 1996 Arbitration Act gives a definition of arbitration agreements with the same terms as section 32 of the 1950 Arbitration Act although more detailed, but it is modelled on article 7 of the Model Law. It is defined as an agreement to submit present or future disputes to arbitration, whether contractual or not. And the section provides that a reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. The definition is substantively detailed. It refers to the already existing disputes or not yet existing disputes, which could be of contractual origin or not. It means that not only are disputes arising from contracts are within the scope of the 1996 Arbitration Act but so too are non contractual disputes such as disputes arising from allegations of negligence against a building contractor in tort and not in contract, or disputes between neighbours about the location of a boundary fence. The use of the term 'dispute' responds to a need to cover the differences between the parties¹⁷⁸. The other important indication is the reference made about the written form of arbitration agreement. Here, it is in harmony with the trend developed by the 1958 New York Convention and the Model Law.

Arbitration law prior to the 1996 Arbitration Act recognised a difference between domestic and international arbitration. The distinction arose with the 1975 Arbitration Act incorporating the 1958 New York Convention on the recognition and enforcement of arbitral awards into English law. The difference between domestic

¹⁷⁶ Although there will be some differential treatment in certain areas.

¹⁷⁷ B. DAVENPORT The new English Draft Arbitration Bill in 10 Arb. Int. 1991. 168

¹⁷⁸ In section 82 it is specified that dispute includes any difference as this issue arisen in the *Sykes v Fine Fair* [1967] 1 Lloyd's Law Rep. 53 at 60 per Lord Justice Danckverts.

and international arbitration had its importance, among other things, for the adoption of a stay of litigation proceedings when initiated while an arbitration agreement exists. The New York Convention removed the discretion of national courts as to whether a stay of proceedings could be granted. A further distinction between domestic and international arbitration was reaffirmed in the 1979 Arbitration Act¹⁷⁹.

That 1996 Arbitration Act, by referring to UK nationals or residents, distinguishes both directly and indirectly between UK nationals and nationals of other EC members states. Such a dichotomy is nonetheless questionable because there are difficulties in justifying measures that are not necessary in an international context ; it seems inconsistent for an arbitration between two English-based companies to be subjected to rules different from those that would apply to an arbitration between an English-based company and overseas-based one ; and concern has been expressed as to the possibility for the distinction being in breach of the European Union law as discrimination against European Community nationals (not English nationals) would arise and so on.

During the gestation of the 1996 Arbitration Act, it was considered whether the dichotomy between international and domestic arbitration should be abolished¹⁸⁰. Consultation on the Bill indicated that the distinction between domestic and non-domestic arbitration agreements could work to the detriment of non-UK EC nationals because they could lose the protection of the courts¹⁸¹. Even if the Departmental Advisory Committee on Arbitration Law (DAC) was aware of the odd result that could be encountered with this distinction, the DAC did not propose to abolish the distinction because there was a need to discuss it further and time was lacking¹⁸². In 1996, the DAC envisaged an escape from the potential difficulties with clause 88 of the 1996 Arbitration Act which was provided for the power to repeal these sections through the mechanism of a positive resolution of each House of Parliament.

The Government chose to include the provisions in the Bill due to the time scale available for the passing of the Bill. But this was done keeping in mind that a full consultation exercise would be undertaken before removing the distinction between

¹⁷⁹ With respect to agreements to exclude the right to appeal to courts on a point of law arising out of arbitral awards or point of law arising during arbitral proceedings under section 3.7 of the 1979 Arbitration Act, and in section 87 of the 1979 Arbitration Act.

¹⁸⁰ For further details on the issue see MERKIN R. ARBITRATION LAW 1997 (Hereinafter MERKIN R. 1997) and DAC Report 1996 and DAC Report 1997.

¹⁸¹ MERKIN R. 1997 chapter 21 p129

¹⁸² DAC Report 1996 p68

domestic and non-domestic agreements. In July 1996, the Department of Trade and Industry (DTI) ran a consultation exercise; answers were in favour of the abolition of the distinction and the application of the international regime throughout (i.e. mandatory stay of legal proceedings in all cases and the ability to exclude the right to appeal on a point of law at any stage)¹⁸³. Besides, in *Philip Alexander Securities and Futures Limited v Bamberger*, Mr Justice Waller took the view that such an approach was discriminatory and in breach of European law¹⁸⁴. Basing the distinction between domestic arbitration agreements and international arbitration agreements on the ground of nationality is contrary to the Treaty of Rome (against the principle of free movements of persons). Mr Justice Waller was of the view that it is difficult to justify objectively discrimination on the basis of nationality¹⁸⁵. The Court of Appeal upheld his decision on 12th July 1996 holding that in the context of the consumer agreement Act 1988, the distinction between international and domestic arbitration agreement is incompatible with European Community law because it amounts to the restriction on the freedom to provide services contrary to article 59 of the Treaty of Rome¹⁸⁶.

In the light of these 2 facts, the DAC has since decided that as matters currently stand, there is no option but to abolish this distinction¹⁸⁷. Therefore 'section 85 to 87 have not been brought into force by the commencement order'¹⁸⁸. The distinction does not exist in the operative provisions of the 1996 Arbitration Act and thus giving a positive outcome after several months of uncertainty.

¹⁸³ DAC Report 1997 p15

¹⁸⁴ *Philip Alexander Securities and Futures Limited v Bamberger*, the Court of Appeal (1997) XXII ICCA Yearbook Comm. Arb. Part V under the United Kingdom or in 1996 European CLYB 296. In the case, the underlying dispute between the parties related to the liability for losses incurred in trading in futures and options by the German customers. The plaintiff (Philip Alexander Securities and Futures Limited) and the customers were embroiled in several litigations in the Commercial Court and in various courts in Germany. The customers had brought actions in several courts in Germany while the plaintiff referred disputes to an LCIA arbitration in London. The defendants Bamberger and others based their request on the ground that the arbitration agreement was invalid. The plaintiff was seeking injunctions and declarations from the English Commercial Court to try to enforce the arbitration agreement.

¹⁸⁵ *Philip Alexander Securities and Futures Limited v Bamberger*, the Court of Appeal (1997) XXII ICCA Yearbook Comm. Arb. Part V under the United Kingdom or in 1996 European CLYB 296.

¹⁸⁶ DAC Report 1997 p15 and MERKIN R. 1997 chapter 1 p30. It was held that any discrimination between the treatment of a UK consumer and a consumer from any other EC countries was in breach of article 6 of the Treaty of Rome and to the principle of free movement of services rules in article 59 of the Treaty of Rome.

¹⁸⁷ DAC Report 1997 p15

¹⁸⁸ The 1996 Arbitration Act (Commencement N°1) Order 1996 signed on 16th December 1996 stipulates that "the rest of the Act, except section 85 to 87, shall come into force on January 31st January 1997".

Part 2 : French law and its definition of arbitration

Definitions of the term 'arbitration' are found in textbooks in which scholars described arbitration by highlighting its main characteristics. Mr David¹⁸⁹ insists upon the arbitrator's mission by saying that arbitration is 'a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons (an arbitrator or an arbitral tribunal composed of several arbitrators), who derive their powers from a private agreement not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement'¹⁹⁰. In the definition, he stresses the importance of the arbitrator's role as Jarrosson did when he defined arbitration as an institution whereby the third party decides a dispute, between two parties or more, in executing a juridical mission granted to him by these parties¹⁹¹.

One of the best definitions, which widely explains arbitration, describes arbitration as an institution of private justice by which disputes are moved away from the jurisdiction of state courts and are decided by individuals who receive for a definite period the capacity to exercise a judicial mission¹⁹². These definitions show a common concern for some aspects of arbitration. They emphasise several points : the arbitrator's mission, his role, the judicial nature of his mission and its contractual origin, the voluntary reference of the dispute by the parties, and the significance of his decision. These above points are primary peculiarities of arbitration that one has to keep in mind as these points are usually found in most of those definitions.

Towards the definition of international arbitration

No legal definition is proposed either in the CC or in the NCPC. The CC only supplies a definition of an arbitral clause. The only definition of arbitration is the significant contribution of article 1492 NCPC. It stipulates that an arbitration is international if it involves international commercial interests - namely in French '*est international l'arbitrage qui met en cause des intérêts du commerce international*'-.

¹⁸⁹ 'L'arbitrage est une technique visant à faire donner la solution d'une question intéressant les rapports entre deux ou plusieurs autres personnes (l'arbitre ou les arbitres) lesquelles tiennent leur pouvoir d'une convention privée et statuent sur la base de cette convention sans être investis de cette mission par l'Etat.' R. DAVID *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 1982 (Hereinafter DAVID 1982)

¹⁹⁰ DAVID 1985 p5

¹⁹¹ 'Institution par laquelle un tiers règle le différend qui oppose deux ou plusieurs parties en exerçant une mission juridictionnelle qui lui a été confiée par celles-ci'. JARROSSON 1987 p372

¹⁹² 'Institution d'une justice privée grâce à laquelle les litiges sont soustraits aux juridictions de droit commun pour être résolus par des individus revêtus pour la circonstance de la mission de juger.' ROBERT & MOREAU 1993 p3

Such a definition is rooted in the case law prior to 1981 and is the outcome of about sixty years of progression in the opinion of French courts. Its initiative originates from the comment of the General Attorney Matter in which an international contract is defined as follows : to be a monetary clause in an international loan, the contract must produce incoming and outgoing movements between states through their borders¹⁹³. The revolutionary content greatly influenced the development of French arbitration law and was a great step forward in the establishment of a specific regime for international arbitration. It is the starting point for the process of creating the definition of international arbitration as it is known today.

In the *Impex* case¹⁹⁴, the Parisian Appeal Court upheld the view that the international characteristic arises from the internationality of the dispute itself, involving international commercial interests such as the transfer of cereals between France and Italy¹⁹⁵. The holding of the court is of great significance¹⁹⁶. That sole factor (the involvement of international commercial interests) was sufficient for the Appeal Court to justify its international character without recourse to other factors (i.e. nationality, place of arbitration or procedural law). The *Impex* decision was positively welcomed by practitioners and, more importantly, was confirmed by the *Cour de*

¹⁹³When presenting his conclusions stipulated that 'pour être ainsi qualifié [de contrat international] il faut que le contrat produise comme un mouvement de flux et de reflux au dessus des frontières, des conséquences reciproques dans un pays et dans un autre.' *Cons. Pélissier Du Besset v The Algiers Land and Warehouse Company Ltd, Cour de Cassation, Chambre Civile, 17th May 1927 in D.1928. 25 comment H. Capitant at p31*

¹⁹⁴*Société Impex v Société Malteria Adriatica* has its roots in several contracts concluded between Impex : a French company and an Italian company Malteira Adriatica importing barley. The Impex company found itself unable to export barley on the basis that the Office National Interprofessionnelle des Cereals (ONIC) refused to grant Impex the export certificate as Impex was in breach of the EEC Treaty. Thus, the Impex company was unable to comply with the contract, consequently Malteira Adriatica brought the matter before the Arbitral Chamber of Paris. Sentenced to pay a large sum of money, Impex tried to escape this decision and challenged the award on the ground that the contract was invalid and that the matter was not arbitrable. *Société Impex v Société Malteria Adriatica*, Appeal Court of Colmar 29th November 1968 in *Rev. Arb.*1968. 149

¹⁹⁵'En l'espèce, il s'agissait bien de clauses d'arbitrage international, le caractère international ne dépendant ni du lieu de l'arbitrage, ni de la nationalité des arbitres, mais du seul fait que la matière soumise aux arbitres est internationale c'est à dire que le marché, objet du litige mette en jeu des intérêts du commerce international, tels que l'exportation par une société française domiciliée en France, de céréales à destination d'acheteurs italiens'. *Société Impex v Société Malteria Adriatica* JDI 1971. 123

¹⁹⁶Previously, even if the economic criterion had already been assessed (in *Trésor Public v Galakis*), French courts never, so much, emphasised that the internationality of arbitration does no longer depend on the criteria of nationality of parties or arbitrators, or on the place of arbitration but rather on the very nature of the dispute itself.

*Cassation*¹⁹⁷. In his excellent case analysis, B. Oppetit stressed the willingness of the *Cour de Cassation* to allow itself room to manoeuvre in assessing the international criterion¹⁹⁸. The internationality of arbitration, thus, arises from the object of the dispute itself and more precisely from the operation giving birth to it. Every operation involving a movement of goods, services, or payment of money from one country to another, involves international commercial interests and so any arbitration in relation to them will be seen as an international arbitration.

Thereafter, French courts generally followed the trend expressed in the *Impex* decision¹⁹⁹ with rare exceptions such as the *Tardieu* case²⁰⁰.

The 1981 reform confirms the constant case-law²⁰¹, by using the purely economic criterion in article 1492 NCPC²⁰². Its formulation is rather laconic but remarkable. It is easily noticeable that the definition rightly uses the subject-matter of dispute to give the international characteristic to an arbitration. A general meaning is given to the interests of international commerce. The term 'commercial' interests must be understood in a wide sense²⁰³. It should include fields such as investments, construction business, exchange, and any provision of services between two countries²⁰⁴. The terms 'commerce' and 'international' will be determined by courts,

¹⁹⁷ In its decision, the *Cour de Cassation* accepted this definition in unequivocal terms. Besides it may well be that the *Cour de Cassation* did not, on purpose, highlight the assertion of the Appeal Court of Paris under which the involvement of the interests of international commerce was sufficient enough to confer the international characteristic on an arbitration.

¹⁹⁸ 'Ce faisant la *Cour de Cassation* se réserve peut être de soumettre à d'autres exigences la définition de l'arbitrage international, à moins que cette précaution ne soit sur un critère économique, soit sur un critère juridique'. *Société Impex v Société PAZ Malteria Adriatica, Malteria Tirrena, Cour de Cassation*, chambre civile 1, 18th May 1971 in JDI 1972. 62 at 66

¹⁹⁹ For instance *SOCEA, SPIE Batignolles, Entreprise v CAPAG-CETRA*, Appeal Court of Paris, 30th November 1972 in JDI 1973. 390 at 392

²⁰⁰ *Tardieu v Société Bourdon, Cour de Cassation*, chambre civile 1, 7th October 1980 Rev. Crit. Droit Comp. 1981. 313 comment Maestre. The *Cour de Cassation* deemed that a contract in question referred to French law and could not be an international arbitration in spite of the need for Mr Tardieu to expatriate himself to Columbia. Its criticism was unanimous because the *Cour de Cassation* opted for a narrow judicial definition, on the eve of the 1981 reform, which reversed what had been stated in the previous case law seen before. The criticism was based upon the fact that the points of contact did not prevent this contract to be international since it involves the interests of international commerce.

²⁰¹ With the exception of the *Tardieu* case

²⁰² Article 1492 NCPC stipulates that an arbitration is international if it involves international commercial interests.

²⁰³ 'Le mot commerce doit encore moins être restreint à l'intervention d'une opération commerciale'. D. 1981.210

²⁰⁴ List proposed by Fouchard in JDI 1982. 380

which will have total discretion to put limits to these terms. Courts have shown their considerable ability in establishing the international characteristics of arbitration²⁰⁵.

This definition has been criticised for being too general and for generating uncertainties and doubts²⁰⁶. But such an assertion is too strong in the view of the present writer. It is felt that the definition has the great advantage of its simplicity. It is also felt that it can be adapted to the circumstances of the case, which French courts have been doing since the implementation of article 1492 NCPC²⁰⁷. Thanks to the case law, the meaning of the definition, and especially of the terms 'commercial' and 'international', are clear enough. French courts have established their limits. Their interpretation does not produce too many difficulties, if the case law, developed after the enactment of the 1981 decree, is considered. The definition of article 1492 NCPC is not tautological because the internationality of arbitration results from a dispute involving several countries at the same time.

The interpretation of article 1492 NCPC in case-law

In practice, French courts gave an interpretation of article 1492 NCPC which conformed to the spirit of the statute. An arbitration was never characterised as international unless the object of the dispute involved international commercial interests²⁰⁸. Sometimes, though a narrower conception of the economic definition was adopted and courts refused to call an arbitration international when it should have been called that way. A good example of a narrower conception is provided by the *Société Andrée und Wilkerling* case²⁰⁹. Obviously, the German nationality of one of the parties is now not sufficient to deduce the internationality of an arbitration in the light of article 1492 NCPC. The analysis of the Appeal Court is incomplete and lacking a proper basis because the share transfer to a German company should have been analysed as a foreign investment in France. Besides, the consecutive movement of money from Germany to France should have been seen as a proper basis of an international arbitration. Is it not this what is implied in article 1492 NCPC? The

²⁰⁵ Later on in this chapter recent cases will be studied in order to study how the implementation of article 1492 NCPC by French courts was made.

²⁰⁶ P. BELLET & MEZGER L'arbitrage international dans le Nouveau Code de Procédure Civile in Rev. Crit. DIP 1981. 611 (Hereinafter BELLET & MEZGER in Rev. Crit. DIP 1981)

²⁰⁷ Please refer to the paragraph dealing with the interpretation of article 1492 in case-law.

²⁰⁸ To the knowledge of the present writer

²⁰⁹ In which the dispute has roots in a contract between two French spouses who committed themselves to transfer their shares (of their company of road haulage) to a German company Andrée und Wilkerling Kommanditgesellschaft. At the end the transfer was not made and a dispute about the management and financial consequences arose. *Société Andrée und Wilkerling Kommanditgesellschaft v Leboeuf et autres*, Appeal Court of Paris 21st February 1984 in Rev. Arb. 1986.65 comment Fouchard

opinion of the Appeal Court was therefore against the trend established by article 1492 NCPC and the case-law interpreting this article.

The *Aranella* case²¹⁰ is the authority as to the interpretation of article 1492 NCPC . The Appeal Court concluded that the arbitration was of an international nature after having checked that it complied with the requirements set forth by article 1492 NCPC. The subject-matter involved international commercial interests, and the sale produced a movement of goods, services, payments between two countries, i.e. Italy and Ecuador. The Appeal Court based its decision upon the principle established in article 1492 NCPC. It reminded us of the Attorney General Matter's assertion²¹¹, and referred to the deep roots of the legal definition. It also indicated that the international nature arises from the economic operation which involves international commercial interests as stated in article 1492 NCPC and the internationality stems from the internationality of the dispute²¹². The Appeal Court deliberately decided to emphasise the economic criterion of the sale rather than the foreign elements (*éléments d'extranéité*). Clearly stated and carefully reasoned, the decision shows very well how French courts use article 1492 NCPC in practice. The *Aranella* decision was therefore welcome²¹³ because of its quality in interpreting clearly and accurately the economic criterion.

²¹⁰ After the sale of two boats by an Italian company *Aranella* to another Italian company created and controlled by an Ecuadorian group of companies, serious damages to both the engines and the hull of boats appeared. Both parties agreed beforehand in their initial contract that any future disputes would be settled by an arbitral tribunal in conformity with the ICC Rule. In Paris, the arbitral tribunal rendered two awards demanding the cancellation of this sale, requiring the return of the price of this sale and granting damages to the Italo-Ecuadorian company. But the *Aranella* company challenged these two awards on the ground of both articles 1484 § 3 and 4 NCPC and 1504 NCPC (dealing with the setting aside of domestic or international awards, if the arbitrator decided in a manner incompatible with the mission conferred upon him and whenever due adversarial process of proceedings has not been fully respected by arbitrator). Both parties contentions were particularly opposed on the nature of this arbitration either domestic or international. The Parisian Appeal Court extensively examined this critical question for the acceptance of the setting aside for either a domestic award with application of article 1484 NCPC or article 1504 NCPC for an international award. *Société Aranella v Société Italo-Ecuadoriana*, Appeal Court of Paris, 26th April 1985 in JDI 1986. 179 comment J.M. Jacquet

²¹¹ In using this 'qu'il suffit que cette opération implique un mouvement de biens, de services, ou un paiement à travers les frontières'. *Société Aranella v Société Italo-Ecuadoriana*, Appeal Court of Paris, 26th April 1985 in JDI 1986. 179 comment J.M. Jacquet

²¹² Considérant que la détermination du caractère international de l'arbitrage s'attache essentiellement à la réalité de l'opération économique à l'occasion de laquelle il est intervenu'. *Société Aranella v Société Italo-Ecuadoriana*, Appeal Court of Paris, 26th April 1985 in JDI 1986. 179 comment J.M. Jacquet

²¹³ By Mezger and Jacquet in their respective analysis of this decision

It has been demonstrated²¹⁴ that French courts did not encounter any apparent difficulties in utilising the definition set forth in article 1492 NCPC. Moreover, a standard expression, namely an arbitration is international if it involves international commercial interests, is now currently used by courts²¹⁵. The criterion of the international nature of a transaction has shown that in practice the economic test can be applied. To conclude, the definition highlights the emphasis given to the economic criterion of the internationality of arbitration. Despite its extreme laconicism, it appears straightforward and its interpretation by French courts seems to be quite easy and consistent according to the case-law studied above.

Part 3 : The ICC Rules and its definition of arbitration

Any arbitration done under the ICC auspices will be an institutional arbitration whereby the permanent body the ICA authorises the opening of arbitral proceedings and monitors their conduct through administrative steps, and the Secretariat handles the cases submitted to the ICA. There are currently two sets of rules : the 1988 Rules currently in use and the 1998 Rules which are not yet in use at the time of this thesis.

The ICC Rules mostly apply to international disputes²¹⁶. The reference of international disputes to the ICC for their resolution is laid down in article 1 of the ICC Rules²¹⁷ which stipulates that the function of the ICA is to provide for the settlement by arbitration of business disputes of an international character in accordance with these rules. The ICC normally deals with international business disputes²¹⁸. Article 1 of the ICC Internal 1988 Rules also stipulates that the ICA may accept jurisdiction over business disputes not of an international business nature if it has jurisdiction by reason of an arbitration agreement. The provision implies that the ICC should ordinarily not be involved in purely domestic disputes or disputes of a non business character, but it may happen. As the ICC is a famous institution,

²¹⁴With the exception of *Société Andree und Wilkerling Kommanditgesellschaft v Leboeuf et autres*, Appeal Court of Paris, 21st February 1984 in Rev. Arb.1986. 65 comment Fouchard

²¹⁵*Kuwait Foreign Trading Contracting & Investments Company v Société Icori Estero & Società Lombardini Estero SPA*, Appeal Court of Paris, 1 chambre, 13th June 1996 in JDI 1997. 151

²¹⁶In reality, French parties may refer their disputes of domestic nature to the ICA as they would do to any other arbitral institutions in France. Article 1 of the ICC Rules implies that the ICC should ordinarily not be involved in purely domestic disputes or disputes of non business character, but it may happen as it has been remarked during my internship.

²¹⁷Of the 1988 Rules and article 1 of the 1998 Rules

²¹⁸Although the ICC has not promoted the use of the ICC arbitration clauses for domestic disputes resolution, the number of business disputes of apparently a purely domestic nature submitted to ICC arbitration has increased in the late 1980's'. CRAIG & PAULSSON & PARK 1990 p171

practitioners and counsel may more often advise their clients to refer their disputes to a well established institution such as the ICC. Both provisions²¹⁹ state the scope of the ICC and reduce it to the dealing of international business disputes.

From the ICC Rules, other features of arbitration can be found. ICC arbitration has the following features²²⁰ : it is characterised by its universality²²¹, no limitation being applied to the nature of the parties' business, nor to their nationality ; it is also characterised by its geographic adaptability ; although the headquarters are located in Paris, meetings and arbitral proceedings may take place anywhere in the world as long as it is suitable to the parties, their counsel, and the members of the arbitral tribunal ; it is also characterised by its openness; indeed there is no list of compulsory arbitrators or counsel that the parties must choose from; the parties can freely choose their arbitrators, failing which the ICA will appoint arbitrators after having asked to a National Committee if any to propose a name for a potential arbitrator ; arbitration is also characterised by its procedural flexibility, arbitrators having an entire discretion on how to organise arbitral proceedings, hearings, submission of proofs, presentation of arguments, the parties, and witnesses, testimony provided that arbitration is confidential; and finally the ICC action can be described as being a *laissez-faire* approach since the ICA and the Secretariat do not interfere in the course of arbitral proceedings. The Secretariat plays the role of an intermediary actor as it handles cases, and provides advice as the application of the rules either by the parties or by arbitrators. Both the ICA and the Secretariat are there to assist arbitral proceedings to ensure their good and smooth functioning.

These features are important data about the true nature of arbitration within the ICC framework. In the light of these features, it can be said that ICC arbitration is a universal and tailor-made settlement of disputes whereby the parties, or otherwise arbitrators themselves, have the freedom and the discretion to organise it as they deem appropriate as long as it complies with the ICC Rules.

In the ICC Rules, there is no definition of the term 'arbitration', but the related terms such as the effect of arbitration agreement, and arbitral tribunal are explained in the rules.

²¹⁹ article 1 of the ICC Rules and article 1 of the Internal Rules

²²⁰ These features were remarked while doing an internship at the Secretariat.

²²¹ For further information, a reference is made in Appendix 1.

Part 4 : Scottish law and its definition of arbitration

No definition for the term 'arbitration' can be found in the Scottish legislation. One of the few definitions is proposed in the famous Stair Encyclopaedia in which arbitration is described as 'a method of procedure by which the parties who are in dispute with each other agree to submit their dispute to the decision of one or more persons, described as arbiters, rather than resort to the courts of law'²²². In this definition, the form taken by the arbiter's decision and the binding feature of his decision are not contemplated. No specific mention of the contract submitting the dispute is made. The usual definition of arbitration indirectly relates to the definition of the submission agreement. Both Bell²²³ and Erskine²²⁴ stressed its contractual aspect. The basis of arbitration is, therefore, a contract whereby the contracting parties exclusively refer their differences to a specific person or group of persons rather than to national courts. Both Bell and Erskine's definitions emphasised the specific nature of the arbiter's decision. It should be compulsory for the contracting parties whether they are happy with it or not. And the parties will have the obligation to comply with the arbiter's decision. In his Synopsis²²⁵, Weir considered that several points should be found in the submission agreement : the parties voluntarily chose the arbiter as a sole judge, the parties perfectly aware that 'to err is human', are bound by his decision and must comply with it²²⁶.

Scottish law on arbitration is also characterised by two legislative texts, one set for domestic arbitration²²⁷, and the Scottish version of the Model Law. The Model Law proposes a definition of international arbitration and useful information can be found in the Travaux Préparatoires.

Article 1§1 of the Model Law stipulates that it 'applies to international commercial arbitration, subject to any agreement in force between this state and any

²²² *STAIR ENCYCLOPAEDIA* 1988 Volume 2 §401

²²³ Bell defined the submission to arbitration as a 'simple contract at common law and as involving certain inherent and implied conditions, which qualify the obligation undertaken by the parties-submitters, to implement the arbiter's award'. BELL 1877 p19

²²⁴ 'A submission is truly a contract, entered into between two or more parties who have debatable rights or claims against one another, by which they refer their differences to the final determination of an arbiter or arbiters and oblige themselves to acquiesce in their decisions'. ERSKINE J. *AN INSTITUTE OF THE LAW OF SCOTLAND* IV.3.29 1871 (Hereinafter ERSKINE 1871)

²²⁵ WEIR M.E *A SYNOPSIS OF THE LAW AND PRACTICE OF ARBITRATION IN SCOTLAND* 1979 (Hereinafter WEIR 1979)

²²⁶ 'In the first place, the parties accept him as sole judge. They do so in the knowledge that 'to err is human' and that therefore, though he commits an error in fact or in law, the two parties are bound by his judgement... [and] they must submit to it be it according to law or not'. WEIR 1979 p3

²²⁷ Which is currently in the process of being replaced.

other state or states'. This directly implies that international arbitration is a specific regime and is different from the domestic regime. The Dervaird Committee felt that such a distinction between domestic and international arbitration respected the spirit of the 1975 Arbitration Act section 1, in force at the time²²⁸. Such a restriction aims at distinguishing arbitrations governed by this law from those which are not due to their domestic nature. The restriction is the result of the UN Commission's wish to limit the scope of the Model Law²²⁹.

Article 2 of the Model Law stipulates that 'arbitration means any arbitration whether or not administered by permanent arbitral institution'. This cannot be said to be a definition *per se*, but rather an explanation on how arbitration should be understood. Is such a definition a deliberate choice by the Commission to restrict the definition²³⁰ of the word 'arbitration'? The determining element for this choice was that the term 'arbitration' is widely used and consequently generally known. Besides, it is common practice for statutes and legislation²³¹ not to propose a definition of arbitration because legislators usually rely on courts to clarify its meaning. A comprehensive definition of arbitration would have been another positive asset²³² and would have been helpful as it would have filled in a gap. It might be said that the Commission was not strong enough to overcome the obvious difficulties in dealing with the matter. It is, therefore, unfortunate that the Model Law does not contain a plenary definition but only a semblance of definition.

And an emphasis was felt to be necessary on the application to both *ad hoc* and institutional arbitration²³³. The deliberate choice of using the general expression of 'whether or not administered by permanent arbitral institutions', arises from the wish of the UN Commission to acknowledge the significance of these institutional bodies. Since the Model Law is only designated for consensual arbitration it does not cover

²²⁸The Dervaird Committee Report p8 (Hereinafter the Dervaird Report)

²²⁹See the 1979 Commission report A/34/17§ 79 in HOLTZMAN & NEUHAUS *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 1989 p28 (Hereinafter HOLTZMANN & NEUHAUS 1989)

²³⁰In the first and second drafts, a finer definition was contained without being extremely extensive or plenary but it did explain what arbitration covers. (This can be found in HOLTZMAN & NEUHAUS 1989 p157 and 159.) However, after deliberation, the Working Group decided to remove all definition. It was considered to be unnecessary and its absence would not be harmful.

²³¹See French legislation on arbitration and English legislation

²³²It would have been a very good opportunity due to the great number of participating states and institutions involved in its law-making.

²³³It should be specified that institutional and *ad hoc* arbitration are covered'. HOLTZMAN & NEUHAUS 1989 p172 and also see Mr Holtzman and Mr Strohback's comments.

compulsory and statutory arbitration²³⁴. As to the Model Law definition of arbitration, the Dervaird Committee did not see anything disturbing which could impede its integration in the Scottish legal system.

With the term 'commercial', the Commission also encountered problems. The Working Group only agreed on the fact that the term 'commercial' should be given a wide meaning 'to meet the concern that in certain legal systems, the terms might be construed in an unduly restrictive manner'²³⁵ because the tradition in civil law countries draws a line between commercial and civil transactions according to whether or not the parties involved are commercial persons. Consequently, the Working Group preferred to avoid these difficulties in choosing a non-controversial definition.

A footnote spelling out the explanation of its interpretation was preferred. It would only provide for some guidance on how adopting countries should construe the term. In it, a constant reference to the wide interpretation of the term is made and is constantly mentioned throughout the legislative history²³⁶. The footnote also gives a non-exhaustive²³⁷ list of transactions which intends to support the idea of a wide definition. Since, the term 'commercial' is not defined in the law itself but in a footnote²³⁸, the Commission felt that the term 'international' should be expressly defined in the text.

Article 1§3 gives the definition of international arbitration²³⁹. These four alternative tests were firmly preferred by the Working Group to the general formula

²³⁴ HOLTZMAN & NEUHAUS 1989 p156

²³⁵ First Working Group Report A/CN.9/216 in HOLTZMAN & NEUHAUS 1989 p45

²³⁶ First Working Group report A/CN.9/216 p45, Second Working Group Report A/CN.9/232 p48 and Third Working Group Report A/CN.9/233 in HOLTZMAN & NEUHAUS 1989 p51

²³⁷ 'Although the examples listed include almost all types of contexts known to have given rise to disputes ... the list is not expressly exhaustive'. Seventh Secretariat Note A/CN.9/264 HOLTZMAN & NEUHAUS 1989 p71

²³⁸ The Dervaird Committee thought that this definition of commercial should be incorporated into this article as being a true part of this definition. See the Dervaird Report p8

²³⁹ Article 1§3 stipulates that 'an arbitration is international if : a- the parties to an arbitration have, at the time of the conclusion of that agreement, their places of business in different states, b- one of the following places is situated outside the State in which the parties have their places of business: i- the place of arbitration if determined in, or pursuant to the arbitration agreement; ii- any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or c- the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.' Paragraph 1.3.c is omitted in the Scottish version.

of article 1492 NCPC of the French decree²⁴⁰. The chosen alternative of the four tests is probably a wiser choice in respect of the potential reaction of courts in other countries than France in using the Model Law.

Under article 1§3, an arbitration is therefore international if it falls into any of those four categories. The four categories were developed with the view that they should fit any kind of situations occurring in international cases.

The first criterion presented in paragraph (a) relates to the place of business²⁴¹ in several different states at the time of the conclusion of the arbitration agreement. The criterion is often adopted in international texts²⁴² firstly because it establishes the permanent seat of a company at a specific place and secondly because it encompasses most cases of an international nature. It must be the place of business that has the closest relationship to the arbitration agreement. With this notion, the Working Group thought about the situation in which a commercial agent is acting on behalf of the Board of Directors of a company. The kind of situation is quite common. And, the test of the closest relationship is much favoured by courts to establish where the place of business is. Here, the Working Group deliberately did not consider any other criteria such as the nationality or the place of incorporation and the place of registration because they do not weigh so much in practice. Even if the choice of the Working Group had been the sole relevant criterion, it would certainly have encompassed most of the situations in international cases. Therefore, an arbitration is international if party A has its place of business in a country A and party B its place of business in country B. No mention is made whether both countries where the place of business is located should be signatories of the Model Law. As it is not specified, it can be concluded that it is not necessary for the country where the place of business is located to be a signatory state.

Besides, Article 1§3 (b) establishes other possible places (i.e. the place of arbitration, the place of performance of contract and the place with which the object

²⁴⁰ The French definition of international arbitration was felt to be too general and might lead to divergent interpretation in national courts of participating states. See Fourth Working Group Report A/CN.9/245 §167 and 168 and First Working Group Report A/CN.9/216§20 in HOLTZMAN & NEUHAUS 1989 p29

²⁴¹ The place of business is not defined in this law. However this criterion is generally known in most of the legal system to be properly understood. That is the reason why it was thought straightforward enough not to require a definition in the Schedule 7 adopting the UNCITRAL for Scotland see F.P. DAVIDSON *INTERNATIONAL COMMERCIAL ARBITRATION SCOTLAND AND THE UNCITRAL MODEL LAW* 1992 p21 (Hereinafter DAVIDSON 1992)

²⁴² The UN Convention on Contracts for International Sale of Goods (Vienna 1980) in its article 1-1 and the European Convention on International Commercial Arbitration (Geneva 1961)

of the dispute is most closely connected) for the arbitration to be international. Article 1§3 (b) extends the area of the internationality of an arbitration by covering situations not previously considered in paragraph (a). The Working Group deliberately extended the test for internationality in order to cover situations left outside the scope of paragraph (a)²⁴³. The situation of paragraph ((b) i) implies that two parties of one nationality can detach their arbitration and transform it into an international arbitration if they choose a place of arbitration in another country.

Article 1§3 ((b) i) is the tangible proof of the importance given to the parties' freedom. It appears then that the Model Law insists on the parties' freedom as it allows a domestic arbitration, when two parties have their places of business in the same country, A, to become international when the parties validly select a foreign place of arbitration in country B. Moreover, a significant qualification appears in subsection (i) with the mention of 'pursuant to the arbitration agreement'. The Model Law insists on the selection of the foreign place of arbitration by indicating that this should be done in pursuance to the arbitration agreement. The provision is quite unclear²⁴⁴. The reader may feel that it is too ambiguous, because the provision covered the case where the place of arbitration was determined by an arbitral institution or arbitrators. Most of the time the institution's rules and most national laws would allow the arbitral tribunal to select the place of arbitration if the parties fail to do so²⁴⁵. When reading the article, it is felt that the Commission left us with 'unfinished business'. The Commission refused to reach a conclusion²⁴⁶. To cover all situations, the Commission should have selected another wording when it dealt with the selection of the place of arbitration by either an institutional body or the arbitral tribunal itself. The provision is not the clearest ever seen. But the expression 'pursuant to' should mean 'according to' what is stated in the arbitration agreement.

²⁴³ Fourth Working Group Report A/CN.9/245§168 in HOLTZMAN & NEUHAUS 1989 at 29

²⁴⁴ Does the expression mean 'according to' the arbitration agreement or not ? If it does indeed mean so, the choice of the place of arbitration must be done according to the procedures imposed in the arbitration agreement. ('It was generally felt that where the place of arbitration was determined under procedures lay down by the arbitration agreement, whether by the parties or by the arbitrator or by some other party or institution, then it could be said that the place was determined 'pursuant to the agreement' p22 DAVIDSON 1992 For this we agree with Fraser P. Davidson) It can be argued that the explanation is most likely the only one available and the most interesting. The expression 'pursuant to' was the occasion of divergent views during the UN Commission's session and no definite conclusion was reached. (See Summary Record A/CN.9/SR.306 §46 and 47 to 51 and Sixth Secretariat Note (Government Comment) A/CN.9/263 article 1§23 in HOLTZMAN & NEUHAUS 1989 p30.)

²⁴⁵ If there is no agreement between the parties, the arbitral tribunal may then choose the place of arbitration. Article 16 of Model Law

²⁴⁶ The place of arbitration if determined in the arbitration agreement or [failing that if chosen by the arbitral tribunal or any permanent arbitration body]. This wording should cover all situations and might be more self-explanatory.

Article 1§3 ((b) ii) describes two situations²⁴⁷ not yet tackled. Under the provision (ii), an arbitration is international where a substantial part of the contract is to be performed in a different state from that in which the parties have their places of business. This would be the case if, for example, two parties A and B entered into a contract to deliver cheese in Scotland while both parties have their place of business in France. This would also be the case if two Scottish parties entered a contract to build houses in France. In both situations, the internationality arises from the purpose of the contract itself. Is it not close to the French definition of an international arbitration ? It was mentioned that the dispute itself does not have to relate to the international element. Here something is not clear. How can the performance of the delivery of cheese in Scotland or the construction of houses by a Scottish party be not international ? If the relations between a producer and a trader do not have the international element, how can the arbitration be international ? Can it only be international on the ground that the contract concerns a foreign market ? Apparently this is the answer that provision (ii) gives to these questions. Under article 1-3 ((b) ii) bis, an arbitration is international when the subject-matter is most closely connected with a foreign place.

Under article 1§3 (c), the parties may relate their subject-matter of the arbitration agreement to more than one country. This is controversial because it allows the parties to escape from the application of the domestic law (usually stricter than the international regime)²⁴⁸. To thwart such a freedom, the Model Law puts in some safeguards by allowing the courts of the state to refuse to refer this case to arbitration²⁴⁹. Why might the parties want to escape from the domestic law ? Simply because domestic laws are usually stricter and impose mandatory rules of procedure, of arbitrability and so on.

In the Scottish version of the Model Law, the provision does not appear. At first, the Dervaird Committee agreed with the provision and did not see any reason of principle why such an arbitration should not fall under this Model Law²⁵⁰. But for purely domestic cases, because courts would probably refuse to enforce such an arbitration agreement (changing a domestic arbitration into an international arbitration), the Dervaird Committee finally decided not to integrate the provision into the Scottish version and recommended another wording of this article stipulating

²⁴⁷Which for the purpose of our study will be separately called ii and ii-bis.

²⁴⁸It was pointed out that courts were unlikely to give effect to such an agreement in a purely domestic case'. in A/CN/H§33 in HOLTZMAN & NEUHAUS 1989 p96

²⁴⁹Article 8 of Model Law

²⁵⁰The Dervaird Report p9

that 'the provisions of this Act, except article 8, 9, 35 and 36, apply whenever the parties to that agreement have expressly agreed that the provisions shall so apply'.

In conclusion, the Model Law represents a substantial effort and a comprehensive step towards a definition of the term 'arbitration' as it gives a definition and an explanation of the connected terms.

It determines how an arbitration can become international if it complies with one of the 4 tests set forth by article 1.3. The four tests encompass all sorts of situations whereby the international character of arbitration arises from the place of business, from the place of arbitration, from the performance abroad of the contractual obligations, and from the subject-matter relating to several countries. The decisive factor, giving the international character to an arbitration, is the domicile of the parties.

The Model Law specifies how the term 'commercial' should be interpreted by the State willing to adopt it. It defines the arbitration agreement in detail in stipulating that already existing disputes and not yet arisen disputes can be referred to arbitration. With both kinds of disputes, the Model Law aims at encompassing all situations. In relation to the arbitration agreement, it also demands that it be in written form. This is amplified by confirming that exchanges of letters, telex, telegrams or other means of telecommunications should provide a record of the agreement.

The Model Law contains a broad definition of the arbitration agreement in giving all details about its form and its content. It also specifies that the text covers *ad hoc* arbitration and institutional arbitration. In saying that the Model Law applies to both types of arbitration, it gives further information about arbitration, namely that *ad hoc* and institutional arbitrations exist. The Model Law only applies to international commercial arbitration. It has been seen that the Model Law contains useful detailed information about arbitration and its connected terms. Despite the lack of a complete definition of the term 'arbitration', the Model Law offers a wide range of data about it. When adopting the text of the Model Law, states will integrate a comprehensive set of provisions containing much information as to the content and the meaning of arbitration.

Part 5 : Conclusion of chapter 2

In the course of this chapter, it has been seen that statutes, legislation and institutional rules do not define the term 'arbitration'. However, some features about its nature are being given. Explanations as to how the term should be understood are usually given in these texts. Some specification on how to determine the international character of an arbitration is given.

For French law, the internationality depends upon the economic criterion of the subject matter which should involve international commercial interests between several countries.

For the recently adopted English Arbitration 1996 Arbitration Act, the criterion of nationality is used to call an arbitration international. An arbitration considered as international in France because it involves international commercial interests would in England be considered as national or domestic because both parties are British nationals²⁵¹.

For the Model Law adopted in Scotland, it is a combination of both criteria of the internationality of the transaction and of the nationality of the parties.

Now that the nature of arbitration has been clarified and the definition of the term 'arbitration' has been studied in detail, the powers and duties of arbitrators can now be considered in the light of the English, French and Scottish legislation as well as in the light of the ICC Rules.

²⁵¹ REDFERN & HUNTER 1991 p16-18

Title two : The powers and duties of arbitrators

In the following chapters, gathered under title two, the powers and duties of arbitrators will be considered. Each power and duty will be studied in the light of the English, French and Scottish legislation as well as the ICC Rules.

Chapter 1 : The powers of arbitrators

The purpose of the chapter is to examine the powers of arbitrators. After their presentation, some personal remarks will be given in a concluding paragraph at the end of each power.

Part 1 : The sources of their powers

Where do the powers of arbitrators come from ? The answer to the question is twofold. They can originate from the law itself. But the main origin of their powers rests in the arbitration agreement. Thus, their powers are essentially of a contractual nature. Their powers are usually conferred by the parties within the limits stated by the arbitration agreement or conferred by the law applicable to the procedure. In an ICC arbitration, their powers may be addressed by the parties in the terms of reference.

Part 2 : The choice of procedure

1./ The power to choose procedural rules.

There is a widespread trend in the arbitration world to supply the parties or otherwise arbitrators with the freedom to choose the procedural rules governing arbitral proceedings¹. If the parties do not choose a set of procedural rules², most legal systems give discretion to arbitrators in choosing procedural rules. In the three legal systems focused upon and the ICC Rules, such a constant freedom is remarked. Whether of domestic or international nature, such a discretion is equally observed.

¹All western rules recognise such a procedural autonomy which means that arbitrators are free to determine the procedural rules they wish to apply and they are not supposed to apply or take directions from any domestic laws'. M. BLESSING *International Arbitration Procedures in Int. Bus. Lawyer* 1989. 411

²Reasons for which may be such as an excessive optimism about their future business relationships in negotiating their contract, or simply inexperience with the arbitration practice or finally for the simple reason that they rely on the arbitrators to do so.

In England

The former Arbitration Acts did not specify whether or not arbitrators have a discretionary power in choosing procedural rules.

The 1996 Arbitration Act follows the trend in letting arbitrators choose their procedure³. Section 34 stipulates that 'it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter'. The arbitrators' freedom is subject to the contrary agreement of the parties. In other words, the provision is not mandatory. The parties can agree to give other powers, and alter the ones listed in this section. This fact is a tangible proof of the respect for the parties' autonomy. If the parties give an exhaustive list⁴ of procedural and evidential powers they wish arbitrators to have, such an agreement will take precedence over section 34. Its implementation only occurs if the parties did not specify any powers. Besides, if a disagreement between the parties and arbitrators as to the arbitrators' powers arises, the parties' views would prevail.

Section 34 is a very significant provision. It goes into far greater detail than previously in specifying the powers of arbitrators. Before, the 1950 Arbitration Act⁵ was drafted in too wide terms to be explicit and did not give enough data. Great inconsistencies were left, and some doubts would arise as to the limits of the arbitrators' powers. The wording of section 34 of the 1996 Arbitration Act has the advantage of clarity : its second paragraph lists procedural and evidential matters. Under section 34§2§g, arbitrators have now the power to act inquisitorially (as opposed to act adversarially) as it stipulates that the arbitrator should himself take the initiative in ascertaining the facts and the law. The provision is new and institutes a power which in the past could amount to misconduct for arbitrators⁶. Section 34§2g institutes a radical mutation in the philosophy of arbitral proceedings, which ought to be underlined. Up to the Act, it was not in the English tradition⁷ to espouse the inquisitorial procedure which was rather a continental feature. In the light of the recent development of international practice in arbitration, the differences between the two kinds of procedure are slowly being erased. The adoption by the 1996 Arbitration

³Section 34 of the 1996 Arbitration Act derives from the 1950 Arbitration Act (section 12.1 to 12.3) and from the Model Law (articles 19, 20, 22, 23 and 24).

⁴In section 34.2 of the 1996 Arbitration Act

⁵In section 12.1 of the 1950 Arbitration Act

⁶It was held to be a misconduct for an arbitrator to adopt the inquisitorial procedure without the consent of the parties. *Chilton v Saga Holidays Plc* [1986] 1 ALL ER 841

⁷Two guidelines were given in order to choose the procedure in the absence of the parties' choice. The procedure must be adversarial and arbitrators are not required to strictly follow the courts procedure. They can exercise their discretion as long as they comply with the essential features of English adversarial procedure. It was held that arbitrators must adopt an adversarial procedure as opposed to an inquisitorial procedure: *Bremer Vulkan v South India Shipping* [1981] AC 909.

Act of such power is certainly the direct consequence of the evolution witnessed in international arbitrations⁸. The provision is therefore extremely important. Accordingly, arbitrators may, unless there is a contrary agreement by the parties, choose an inquisitorial procedure as opposed to an adversarial procedure, implying their proactive role during arbitral proceedings.

In France

French law encourages a creative task⁹ for arbitrators in choosing their procedure and in creating a tailor-made set of rules regarding procedural matters in pursuance of articles 1460 NCPC and 1494 NCPC respectively for domestic and international arbitrations. Such a principle of independence is affirmed by article 1460 NCPC. Arbitrators may determine the procedure without being bound by courts rules with some exceptions¹⁰, unless the parties have provided otherwise in their arbitration agreement. A liberal approach towards these questions of procedure has been adopted, whereas the former trend was to impose stricter rules.

France allows international arbitrators¹¹ to choose any applicable procedure even when the parties have specified in an arbitration clause where the arbitration should take place. Article 1495 NCPC considers the situation where an international arbitration is submitted to French law. Its implementation occurs either at the parties' request or at the arbitrators' request or finally if the conflict of law rule has decided that French law would apply to an international arbitration. The submission to the rules of French procedural law must not be a yoke for international arbitrations. French procedural law should help and provide guidance to arbitrators and only have a complementary character. The interest of article 1495 NCPC rests on the use of the rules established for domestic arbitration but without their mandatory nature¹². Article 1495 NCPC offers a triple choice¹³ : the rules for domestic arbitration, the rules for purely international arbitration and finally the system established by article 1495 NCPC allowing the submission to international arbitration of rules for domestic

⁸In the ICC Rules and the LCIA Rules, there are provisions authorising the use of inquisitorial procedures.

⁹E. LOQUIN *Le pouvoir des arbitres internationaux à la lumière de l'évolution du droit de l'arbitrage international*. 110 JDI 1983. 330

¹⁰Of the guiding principles of litigation stated in the articles of the NCPC. Refer to Appendix 3.

¹¹By relying upon article 1494 NCPC.

¹²Which are for instance the arbitration agreement may directly or by reference to a set of rules define the procedure to be followed in the arbitration proceedings; it may also subject it to a given procedural law. If the agreement is silent the arbitrator either directly or by reference to a law or a set of rules shall establish such rules of procedure as may be necessary.

¹³D. COHEN *La soumission de l'arbitrage international à la loi française* in *Rev. Arb.* 1991. 155.

arbitration without their mandatory aspect. The French position towards international arbitrators is genuinely liberal and allows a wide range of attitude.

In the ICC Rules

The ICC Rules also give arbitrators a latitude to fix the rules of procedure¹⁴ and it can be done by the way of procedural orders. As Craig and co-authors described it, the freedom left to arbitrators to fix the rules of procedure is 'consistent with the aim of the rules to provide a universal procedure for the settlement of international disputes detached to the extent possible from the particularities of national law procedures'¹⁵. By virtue of the ICC Rules, arbitrators have a wide discretion in matters of procedure. The fact was underlined in the ICC case 1512/1971, where arbitrators followed the law of the country in which the proceedings were taking place as the parties did not indicate a choice. It was said that the freedom of decision regarding the proceedings does not 'signify complete and unfettered discretion. In applying the ICC Rules, in keeping with their spirit and in accordance with the nature and essence of international business arbitration, arbitrators cannot avoid the duty of abiding by the general fundamental principles of procedure'¹⁶. Under the ICC Rules, arbitrators have undoubtedly a great freedom to fix the rules.

In Scotland

Arbiters also had a discretionary power to regulate the procedure¹⁷. If the parties have not specified by which rules the arbitration shall be conducted, this shall be done by arbiters¹⁸. They were the masters of the procedure¹⁹ as long as they kept in mind and complied with their duties originating from their office. Their powers are granted to facilitate their rendering of a decision. Accordingly arbiters were entitled to take all steps necessary for the good functioning of the arbitral process²⁰.

¹⁴Under article 11 of the 1988 ICC Rules and article 15 of the 1998 Rules

¹⁵CRAIG & PARK & PAULSON 1990 p269

¹⁶JARVIN & DERAIS *COLLECTION OF ICC ARBITRAL AWARDS 1974-1985*. 1990 p3

¹⁷BELL 1877 p172 and GUILD 1936 p55

¹⁸The survey of Mr Fraser Davidson shows that for arbitration commenced in 1990, almost 12% saw the adoption of the procedural rules of the Law Society of Scotland. FRASER DAVIDSON *THE PRACTICE OF ARBITRATION IN SCOTLAND 1986-1990*. 1993 p12

¹⁹In the terminology used by Bell

²⁰E.g. the information of the parties, the consultation of experts, the choice of proofs, the choice of evidence, the determination of the place and the time of hearing after consideration of the parties' views. Similarly to a case in court, and after the acceptance of office, the arbiter shall issue order for claims and answers. The claimant must put in written terms his claim to allow the other party to answer. No special style is required. However these claims and answers should have the general form of the pleadings of the parties in courts.

The Model Law also grants a great power to arbitrators in choosing procedure. A condition is nonetheless required. If the parties failed to lay down their own set of procedural rules, only then are arbitrators in charge of it. Accordingly arbitrators have a wide discretion on how to conduct arbitral proceedings²¹. Certain limitations are imposed upon this freedom²².

Conclusion

It has been seen that, unless otherwise provided by the parties, most arbitral institutions such as the ICC and most statutes confer on arbitrators the freedom to select procedural rules. In fact a wide range of solutions is open to an international arbitrator. They may be from a civil law or a common law country or simply a combination of both procedures²³ or none of the previously mentioned but a tailor made procedure.

International arbitrators should take into consideration, in determining the procedure, the parties' origin as well as practical matters such as the domicile of the parties, the location of witnesses and the subject-matter. Besides, they should take into account all particular procedural requirements of the state where the award should qualify for recognition and enforcement. And arbitrators should avoid cumbersome and time-consuming procedures with a view to speeding up arbitral proceedings. Some advise²⁴ that the arbitral procedure should not exactly copy a particular local procedure. It might be an inappropriate response to the particular demands of international arbitration. A particular procedure may not be known by the parties and their counsel and they may consequently be forced to seek assistance of local specialists. Considering these parameters, arbitrators may select procedural rules for the discovery of documents, evidence, proof, the presentation of each party's contention, and the written and / or oral aspects of procedure. It seems possible for international arbitrators to choose a set of procedural rules contrary to the one normally in use in the country where the arbitration is taking place. For instance in a civil law country where the court procedure follows the inquisitorial approach, there is

²¹ Article 15, 19 of the Model Law

²² Articles 18; 23§1; 24§3; 24§3; 27 of the Model Law.

²³ One should keep in mind that there is not a single civil procedure used everywhere. In fact, one finds a different civil procedure in every country applying it. Every country has its own civil procedure in the same way there is not a single common procedure applied in every country with a common law background.

²⁴ M. BLESSING *The ICC Arbitral Process Part III : The Procedure Before the Arbitral Tribunal* in ICA Bulletin 1992. 23 (Hereinafter BLESSING in ICA Bulletin 1992) and C. REYMOND *Civil procedure and International arbitration at a conference London 17th-18th February 1994 The Reform of Commercial Arbitration Procedure* (Hereinafter REYMOND in CONFERENCE 1994)

no public policy excluding the freedom of the parties taking part in an international arbitration to agree on an adversarial procedure. Arbitrators may also choose to harmonise the contrasted rules of procedure from the civil and common law system in blending these two. They would then reach an harmonisation and internationalisation of the procedure²⁵ which is a point of great interest because the advantages of both systems could be combined. The harmonisation has also a positive impact on the parties.

With the group of legal systems and rules under study, a representative of both families of law, civil and common law, can be examined as well as particular institutional rules mixing some points.

2./ Can arbitrators impose their view on procedure ? Can the parties impose their views on procedure after the appointment of arbitrators? What is the position under the Rules and the legal systems under study ?

It is generally agreed that the parties can, without doubt, impose their ideas on procedure at the outset of the arbitration and before the acceptance by arbitrators of their mission. In theory, after arbitrators have been appointed they should be the masters of procedure. If they are indeed free to choose the set of procedural rules as it is said, can they go against the parties' will in choosing a different procedure? If the parties did not select their own rules of procedure, arbitrators should be free to choose any tailor-made procedure they wish, whether in accordance with the parties' ideas or not. The view reflects common sense and should not be too difficult to put into practice. But problems may arise when arbitrators choose a set of rules which is not in accordance with the parties' hopes and they consequently refuse to implement it. If arbitrators cannot carry out their discretion as to procedural rules because the parties disagree with their choice and refuse to implement them, arbitration proceedings are in a deadlock. Proceedings may be endangered even before they actually started.

It cannot be denied that the parties have the capacity to impose their views on procedural matters at the outset of arbitration. Some doubts may arise as to the possibility of that after the acceptance of office by arbitrators and the terms of reference have been drawn up for ICC arbitrations. If after the selection of a procedure by arbitrators, the parties disagree with their choice, e.g. if the parties discover that

²⁵An idea which has been developed by several famous specialists in arbitration such as B. Goldman who said 'la synthèse des procédures arbitrales internationales permettra de tirer parti des mérites et de supprimer les excès de ses deux composantes'. GOLDMAN in *ETUDES OFFERTES A PIERRE BELLET* 1991 p243. (Hereinafter GOLDMAN in *ETUDES* 1991)

they want an adversarial procedure or an inquisitorial procedure or anything else, then problems arise.

There can then be a situation where arbitrators and parties strongly disagree. During a preliminary hearing, if any, arbitrators and parties should aim at reaching a compromise satisfying both sides. Always keeping in mind the parties' interests, arbitrators should firstly listen to their views as to procedure, and they should adopt a diplomatic mid-way solution if acceptable to both sides. Arbitrators should be resolute. They should show the parties who leads the arbitration but they should nonetheless try to compromise.

If arbitrators do not take into consideration the parties' opinions and refuse to compromise, their position will become impossible and they will not be able to perform their assignment in the best way. Carrying out their mission will then be impossible and the only solution left will be to resign. If arbitrators do not resign, they risk being dismissed or challenged by the parties. A personal view is that their resignation, due to the parties' refusal to let them perform their task, is a complete failure and waste of time and money. In the end, the parties would be left with the choice to start again from the beginning with another arbitrator or otherwise they may have to give up the arbitration.

In *Chilton v Saga Holidays plc*²⁶, the arbitrator refused to allow cross-examination to the defendant's solicitor on the ground that it could be unfair to the plaintiff who was not represented by a solicitor and the plaintiff could only approach the cross-examination as a layman. Thus the arbitrator took the view that all questions were to be put through him. The defendant applied to set aside the award on the ground that the refusal was contrary to the rules of natural justice. The courts decided that the arbitration in question, despite the fact that it was informal, should have been carried out in conformity with adversarial principle. It was also fundamental that each party could tender its own evidence and the opposing party could ask questions designed to probe its accuracy and completeness. Moreover, it was not within the duty of arbitrators to make good any deficiencies in the position of the unrepresented party²⁷. Such an extreme situation is not a positive outcome, and the kind of incident

²⁶*Chilton v Saga Holidays plc* [1986] All ER 841 The arbitration was organised before the registrar under the CCR Ord 19 whereby the hearing was to be informal and the arbitrator could adopt any method of procedure he considered to be convenient and which afforded a fair and equal opportunity to each party to present his case. At the hearing the plaintiff came in person and the defendant with his solicitor.

²⁷*Chilton v Saga Holidays plc* [1986] All ER 841 at 844 Lord Donaldson held that the arbitrator was in breach of the system operating in this country because it is 'basically an adversarial system and it is fundamental that each party shall be entitled to tender their own evidence and that the other party

could have a negative impact on the parties. Both parties and arbitrators ought to be reasonable in finding an acceptable compromise.

The 1996 Arbitration Act seems to go some way in providing an answer with section 34, which deals with the power of arbitrators to decide procedural and evidential matters. If the use of the opening words is considered, it appears that an unusual expression is utilised 'subject to the right of the parties to agree any matter' rather than the more usual expression 'unless otherwise agreed by the parties'. In the writer's view, this might suggest that arbitrators would ultimately decide procedural and evidential matters even if there are in conflict with the parties as long as no agreement between the parties has been put into writing²⁸. The point is enhanced by the fact that during the consultation taking place before the publication of the Act as a bill, there was pressure to give arbitrators the ultimate power to decide these matters.

In conclusion, if the parties start interfering in the course of the arbitrators' work, their interests might be put at risk. When they decide to enter into an arbitration, they should accept the arbitrators' choice, and preferably let them select a procedure if they have failed themselves. If the parties want to interfere and arbitrators refuse to reach a compromise, they should resign or the parties could require the intervention of the courts to remove them from office. And the parties will be left with the solution of appointing a new arbitrator and starting all over again which will be time consuming and money costing.

3./ The power of arbitrators to conduct the proceedings according to the texts under study

When the parties to arbitration agree to grant discretion to arbitrators to establish procedural rules, common sense would suggest that they also agree to let them conduct proceedings as they wish.

English arbitrators also conduct arbitral proceedings. As Lord Diplock said an arbitrator has 'a complete discretion to determine how the arbitration is conducted from the time of their appointment to the time of their award, so long as the procedure

shall be entitled to ask questions designed to probe the accuracy or otherwise, or the completeness or otherwise, of the evidence which has been given'.

²⁸According to section 5 of the 1996 Arbitration Act, any formal requirements of an arbitration agreement or any agreement between the parties concerning the arbitration must be put in writing to be effective. So any agreement between the parties, if it is effectively to override the tribunal's power to decide procedural matter must be in writing.

he adopts does not offend the rules of natural justice'²⁹. The 1996 Arbitration Act enhances the opportunity left to arbitrators to conduct arbitral proceedings under section 34.

French arbitrators are also free to conduct arbitral proceedings as long as they comply with the basic guiding principles of litigation which pursuant to article 1460 NCPC are applicable to arbitral proceedings.

The ICC Rules reflect the above tendency. ICC arbitrators are free to direct arbitral proceedings³⁰, but they are obliged to ensure equal treatment of the parties and to give them a full opportunity to present their case, but they must hold a hearing upon request, and decide on the basis of documentary evidence subject to the parties' agreement.

The UNCITRAL arbitrators may conduct arbitral proceedings as they considers 'appropriate' but keeping in mind the requirements of equal treatment of the parties and the full opportunity to present one's case.

Scottish arbiters are undoubtedly the masters of the procedure as long as they comply with the duties arising from their office.

However, the freedom of conducting proceedings is only relative because arbitration is never completely free from public policy requirements and the mandatory rules imposed to ensure a fair and equitable trial for the parties. These mandatory rules and public policy are obvious restrictions on party autonomy, but it is for their own good and for the best enforcement and recognition of future awards.

It has been demonstrated that most statutes and institutional rules grant a certain power or freedom to arbitrators in order to conduct arbitral proceedings. Mandatory rules imposed by both legislation and institutional rules are there to restrict the power and freedom of arbitrators.

Part 3 : Kompetenz-Kompetenz

The principle of *Kompetenz-Kompetenz* (in its German terminology) implies that arbitrators or sole arbitrators have the power to decide upon their jurisdiction. The *Kompetenz-Kompetenz* is a power which is usually given to arbitrators³¹. The modern practice of international arbitration is to spell out this power in express terms.

²⁹*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 985

³⁰Under article 14§1 of the 1988 Rules and article 20 of the 1998 Rules

³¹ REDFERN & HUNTER 1991 p276

In England

The *Christopher Brown* case³² has clearly established the power of arbitrators to decide if they have jurisdiction to deal with the case subject to control by courts³³. From this case, arbitrators in England had the power to decide their jurisdiction when questioned. The *Harbour* case³⁴ further established that if the arbitration clause is sufficiently widely worded arbitrators had in principle the jurisdiction to determine their own jurisdiction under the main agreement³⁵. But the *Harbour* case did not go 'as far as saying that all matters affecting the arbitrators' jurisdiction may be decided by them although that proposition may flow from the reasoning'³⁶. But the *Kompetenz-Kompetenz* has also been denied to arbitrators³⁷. In theory, the English position before the 1996 Arbitration Act was that arbitrators had jurisdiction to deal with issues of competence to this that their decision could always be questioned by the courts.

Section 30 of the 1996 Arbitration Act codifies the principle of *Kompetenz-Kompetenz* in saying that arbitrators have the ability to rule on their own jurisdiction (a) whether there is a valid arbitration agreement, (b) whether the arbitral tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. It recognises the doctrine of *Kompetenz-Kompetenz* pursuant to which arbitrators may decide the issues concerning their own jurisdiction in relation to arbitral proceedings. Several points should be remarked. Section 30 establishes that the parties may contract out from this power. The parties may agree that arbitrators should not be able to exercise such a power³⁸. In providing that the parties may decide not to give this power to arbitrators, the principle adopted is clearly different from the principle contained in the Model Law (article 16) . It is a

³² *Christopher Brown v Genossenschaft Österreichischer Waldbesitzer* [1954] 1 QB 8

³³ This case shows that arbitrators whose jurisdiction is challenged are entitled to make their own enquiries into the question whether or not they have jurisdiction.

³⁴ *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep. 455

³⁵ It illustrated that the main contract and the obligation to arbitrate are different agreements and that any challenge as to the validity of the main agreement has no necessary impact upon the validity of the arbitration clause.

³⁶ MERKIN R. 1997 chapter 7 p4.

³⁷ It was demonstrated that English courts did not recognise such a power for arbitrators in holding that if the dispute as to whether the contract which contained the clause had been entered into at all, that issue cannot go to arbitration under the clause, for the party who denied that he had ever entered into the contract is thereby denying that he has ever joined in the submission. *Heyman v Darwin Ltd* [1942] AC 356.

³⁸ The contrary agreement by the parties can be an express clause which removes the jurisdictional issues from the arbitrators' competence or a clause which is limited to specific matter, i.e. matters arising under the contract or specific matters of law. See MERKIN R. 1997 chapter 7 p4

non-mandatory provision in contrast with other texts³⁹. Secondly, the extent of their power is limited to the consideration of the validity of the arbitration agreement, whether arbitrators are properly appointed and whether the matters in dispute have been submitted to arbitration in accordance with the arbitration agreement. Again, the principle of *Kompetenz-Kompetenz* is limited in the Act to the matters described in the section while the Model Law permits a ruling on competence irrespective of what has been agreed by the parties.

The recognition of the *Kompetenz-Kompetenz* doctrine as it is done in the 1996 Arbitration Act appeared to be a necessity; because the case law used to encourage arbitrators to rule on their own jurisdiction but with limits; and because of the great advantage of this doctrine e.g. it avoids delays and difficulties when a question is raised as to the jurisdiction of the arbitral tribunal⁴⁰. The 1996 Arbitration Act clarifies the situation and precisely gives the limits and the scope of this doctrine.

In France

French jurisprudence has extensively discussed this issue in several cases⁴¹, particularly in the *Gosset* case⁴² in which it was held that 'in matters of international arbitration, the arbitration clause whether separately concluded or inserted into the main contract always presents ... a complete juridical autonomy excluding the possibility that it could be affected by the eventual nullity of the main contract'⁴³. Two consequences arose from the above. Firstly, the arbitration clause could be subjected to a potentially different law from the one regulating the general contract. Secondly, the events which might influence or nullify the general contract will not affect the arbitration clause. From the above, it was concluded that the arbitration clause always presents a complete judicial autonomy. Such a principle allows arbitrators to decide on their own jurisdiction even if a party alleges that the main contract has been terminated for any reason.

³⁹Unlike the Model Law article 16, which is mandatory and article 1466 NCPC in French law.

⁴⁰DAC Report 1996 p 33

⁴¹*Hetch v Société Buismans*, *Cour de Cassation*, chambre civile 1, 4th July 1972 in JDI 1972. 843 comment B. Oppetit and *Hetch v Société Buismans*, Court of Appeal, Paris 13th December 1975 in JDI 1977. 107 Comment Loquin

⁴²*Gosset v Carapelli*, *Cour de Cassation*, chambre civile1, 7th May 1963 in D.1963.545 Comment J. Robert.

⁴³With the *Gosset v Carapelli* decision, the *Cour de Cassation* integrated the doctrine of separability or autonomy of an international arbitral agreement into the legal framework applying to international arbitration. In this case, the separability issue arose in connection with an effort by the Italian company to enforce in France an award rendered against Gosset.

Article 1466 NCPC allows arbitrators to decide on the validity or scope of their mission. The recognition is a key innovation of the 1980 Decree⁴⁴. Article 1466 NCPC applies whenever the principle of the arbitrators' competence is at stake and also when the scope of their judicial power is challenged. Even if there is a slight distinction between both principle and scope, they both receive a similar solution that is the recognition of the arbitrators' power to settle the dispute. The 1981 Decree is silent as to their competence at international level. There is no symmetrical text to article 1466 NCPC allowing an arbitrator to rule upon his competence. Therefore, one had to wait for the *Ganz v Société Nationale des Chemins de Fer Tunisiens* case⁴⁵ which shed some light as to the recognition of their competence to decide upon their competence.

In the ICC Rules

Should one party raise one or more pleas concerning the existence or validity of the arbitration agreement and should the ICA be satisfied with the prima facie existence of such an agreement, arbitrators shall decide whether they have jurisdiction to decide the case. Arbitrators have the power⁴⁶ to determine whether they have jurisdiction or not⁴⁷.

In practice, when the answer to the request for arbitration is received, the Secretariat always checks whether or not the defendant(s) raises a plea concerning the existence or the validity of the arbitration clause. For setting the case into motion, and if a plea has been raised by the defendant(s), a report will be prepared by a member of the court in charge of considering whether the plea raised is valid or not⁴⁸. If the ICA is satisfied of the existence of the arbitration clause, the case will be set into motion and arbitrators will be asked to rule upon their jurisdiction. The arbitrators' decision

⁴⁴Before the enactment of the 1980 Decree, there was an passionate battle which ended up with the recognition of the Competence-Competence doctrine in 1980.

⁴⁵En matière internationale, l'arbitre a compétence pour apprécier sa propre compétence quand à l'arbitrabilité du litige au regard de l'ordre public international et dispose du pouvoir d'appliquer les principes et les règles relevant de cet ordre public ainsi que de sanctionner leur méconnaissance éventuelle sous le contrôle du juge de l'annulation'. *Ganz v Société Nationale des Chemins de Fer Tunisiens*, Appeal Court of Paris, 29th march 1991 Rev. Arb.1991.478 comment Idot

⁴⁶Under article 8§5 of the 1988 Rules and article 6 of the 1998 Rules

⁴⁷This matter was extensively discussed in the ICC jurisprudence such as ICC case 1526/1968 which can be referred to in JDI 1974. 915, ICC case 4381/1986 in JDI 1986. 1103 and ICC case 5065/1986 in JDI 1987. 1039. and ICC case 1526/1968 in JDI 1974. 915 at 918

⁴⁸During my internship, a member prepared a report in which he considered whether there was a prima facie agreement to arbitrate between the claimant and the Ministry of Economy of a country. The reporter checked if either the state or the its ministry had signed an agreement to arbitrate, whether either of the two were involved in the negotiations leading to the underlying contract. Finally the reporter checked if the state could be in any involved in the underlying contract through an intermediary. In that case, the ICA refused to go on with this arbitration upon the advice of its reporter.

can take the form of a partial award or be included in a final award. The 1998 Rules would not bring any substantive changes to this practice.

In Scotland

The Model Law spells out the principle but also extends its scope. Under article 16, arbitrators can deal with objections based upon the existence and the validity of arbitration agreement, or that local law prohibits the subject-matter to be settled by arbitration, or that the dispute falls outside the scope of the arbitration agreement. Such power has a mandatory character since the parties cannot agree to limit the arbitrators' power. It also establishes a certain timing for the pleas to be presented. It also imposes some limits to the power in subjecting it to the review of the court under articles 16§3, 34 and 36. Finally, the ruling on the competence-competence can be done in a preliminary award or be included in the final award.

In Scotland, arbiters were able to establish and decide if they had jurisdiction to consider the matters referred to them. It was clearly established in *Christison's Tr v Callender-Brodie*⁴⁹ that arbiters had to settle their own jurisdiction and decide that they have jurisdiction though their decision was not final because it could always be reviewed by the court. But still they are bound to take the first step and if they come to a negative conclusion, they would be bound to say so and refuse to go on⁵⁰. In the case, the issue was brought up by the landlord who objected to the arbiter's competency. Before issuing his award, the arbiter submitted the case for the Sheriff's opinion. Later Lord President Dunedin considered that although the arbiter was not asked to give a decision on the plea of competence, it could not be held to be too late to raise this issue.

Conclusion

Most legal systems and institutional rules spell out the principle of competence-competence with or without some extension. In the French legislation, the Scottish domestic arbitration law and in the Model Law, the arbitrators' power to rule on their jurisdiction is limited by the review of state courts which will verify the validity of their ruling. The ICA scrutiny occurs at the beginning on the basis of the parties' objections and leaves arbitrators free to decide upon their jurisdiction. Thus, any decision is subject to the courts' control.

⁴⁹*Christison's Tr v Callender-Brodie* (1906) 8F 928

⁵⁰*Christison's Tr v Callender-Brodie* (1906) 8F 928 at 930 per Lord President Dunedin

It has been seen that, depending on which legal systems or rules are concerned, the review by national courts or other is likely to occur at several stages : at the beginning, during the arbitration process and after the issuing of the award on the matter. Such scrutiny exercised by courts ensures of course the consistency and the regularity of their ruling but it is obviously time-consuming.

In the light of the other laws, the former English position was archaic. Such a negative approach to the *Kompetenz-Kompetenz* principle did not follow the general trend of international practice whereby competence-competence is generally recognised. The clear mistrust towards arbitration shown by English courts was clearly undesirable and had to change if England was to increase its attraction for the parties and be a usual venue for international practice. With the 1996 Arbitration Act, the English position is now in complete harmony with other countries and follows the world-wide trend.

Part 4 : The power to judge as amiable compositeurs according to the texts under study

The distinction between arbitrators and *amiable compositeurs* rests in the fact that the latter may disregard the strict legal approach and decide the subject-matter with equity. Amiable composition can be seen as the exclusion of implementing in strict accordance with the rules of law and a great flexibility in applying these rules of law. They may disregard the strict legal rules of interpretation of contract. With procedural rules, they have a greater freedom since arbitral proceedings are less formal. As to the merits of the case, they have a wider freedom vis-à-vis the rules of law. Therefore, their powers relate to both the rules of procedure and the merits of the case. What is more, they have a greater latitude in dealing with *lex mercatoria* and with trade practices. Therefore, amiable composition removes the imperative aspect of the rules of law, allowing them to solve a dispute on the basis of what is 'fair and just in the light of surrounding circumstances, rather than by a straightforward application of legal rules'⁵¹. Arbitrators acting as *amiable compositeurs* without having been asked to do so by the parties would definitely exceed their mission⁵². The parties have the entire discretion to require arbitrators to solve their dispute under the principle of

⁵¹POZNANSKI The nature and the extent of the arbitrator's power in international commercial arbitration in *Journal of Int. Arb.*1987.79 (Hereinafter POZNANSKI in *Journal of Int. Arb.*1987)

⁵²'The freedom to rule as an *amiable compositeur* is available only to the extent of the parties' freedom of contract.' POZNANSKI in *Journal Int. Arb.*1987.79

amiable composition⁵³. They may express such a will in their arbitration agreement. The only limits to the arbitrators' power to act as *amiable compositeurs* are the will of the parties, to reach a fair and equitable resolution of the dispute complying with the *ordre public* and finally to ensure the enforceability of the final award.

The difficulty lies in the fact that the right to decide as *amiable compositeurs* is not recognised by all system of laws. It is mostly recognised by civil law countries and countries influenced by the civil law system.

French law allows arbitrators to decide the case put before them as *amiable compositeurs* if the parties have expressly agreed in their arbitration agreement to grant such a power. For international arbitration, article 1497 NCPC adopts a symmetrical rule to that of article 1474 NCPC (relating to domestic arbitration) which allows the parties to grant arbitrators the mission of ruling their dispute as *amiable compositeurs*. In international arbitration, amiable composition is possible if French law is applicable to the dispute and if the system of law where enforcement is envisaged does not prohibit amiable composition. In other cases, amiable composition loses its interest because several systems of law do not recognise it. Moreover, in an international arbitration, an amiable composition is not under the obligation to follow international public order⁵⁴.

Both the Model Law and the ICC Rules recognise amiable composition. In both cases, the parties' agreement authorising arbitrators to decide as *amiable compositeurs* must be expressly specified in the arbitration agreement. Pursuant to article 13§4⁵⁵, the parties to an ICC arbitration may grant them such a power. The question may come up at the drafting of the terms of reference when the parties are required to state which powers they wish to grant them. The article 28§3 of the Model Law acknowledges that arbitrators shall decide *ex aequo et bono* or as *amiable compositeurs*. A safeguard was introduced with the express authorisation of the parties, which would avoid any risk for the parties unfamiliar with such a power, especially for those with a common law background. The recognition of amiable composition suggests, in my opinion, that the drafters of the Model Law wanted to find a certain harmony with other systems of law in the making this law⁵⁶. In Scotland, it was held, that if arbiters, acting

⁵³ Or judging in accordance with *aequo & bono*.

⁵⁴ In contrast with *amiable compositeur* in domestic arbitration.

⁵⁵ Of the 1988 Rules and article 18 of the 1998 Rules

⁵⁶ A/CN.9/264§8 in HOLTZMANN & NEUHAUS 1989 p788

as *amiable compositeurs*, disregarded the law, they would be accused of misconduct⁵⁷ and their award would be reduced. The position was accepted until the Dervaird Committee recommended the implementation of the Model Law in Scotland. With its introduction in Scots law, Scottish courts are now obliged to accept the amiable composition.

The position in English law has been rather difficult to assess with certainty. So far a great mistrust towards amiable composition has been noticed. English courts would not even accept nor enforce a reference whereby the parties gave the power of amiable compositor to the arbitrator⁵⁸. Hence, a strong condemnation of the power to act as *amiable compositeurs* has been witnessed so far, simply because they are able to disregard the law and to decide the subject matter submitted to them according to what they consider fair and reasonable⁵⁹. Judging as *amiable compositeurs* implies that arbitrators decide the subject-matter with equity and fairness, which are abstract concepts not very well established according to common lawyers. Such abstract concepts cannot be relied upon.

With the *Almelo* case⁶⁰, the European Court of Justice (ECJ) considers that Dutch courts determining an appeal against an arbitral award in accordance with what appears fair and reasonable must be regarded as a court or a tribunal within the meaning of article 177 of the Treaty⁶¹. Since the ECJ accepts that Dutch courts deciding in accordance with what appears fair and reasonable (that is acting as *amiable compositeur*) is a court or a tribunal within the meaning of article 177 of the Treaty; does the ECJ mean that European national courts are allowed to do the same? Yes. On the one hand, under the principle of the primacy of European law, English courts will, in the near future, be facing a disturbing challenge whether or not to follow the move shown at European level according to which amiable composition is accepted and recognised. If they are still unwilling to change their view, such a

⁵⁷'If it could be proved that the arbiter ... had fashioned the law to suit his own ideas then he would be guilty of misconduct and his award would be reduced'. *Mitchell-Gill v Buchan* 1921 SC 390 per LP Clyde at 395

⁵⁸*Overseas Insurance Co. Ltd v Mentor Insurance Co. Ltd* [1989] 1 Lloyd's Rep. 473 at 485 Lord Justice Parker hold that 'I have no hesitation in accepting ... that a clause which purported to free arbitrators to decide without regard to the law and according for example, to their own notions of what would be fair would not be a valid arbitration clause'. In this case, it was held that an arbitration clause giving the power to act as *amiable compositeur* was not valid.

⁵⁹Arbitrators must 'apply a fixed and recognised system of law'. *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering* [1962] 2 Lloyd's Rep. 257 at 264

⁶⁰*Municipality of Almelo and Others v Energiebedrijf Ijsselmij NV* [1994] 4 ECR 1508

⁶¹*Municipality of Almelo and Others v Energiebedrijf Ijsselmij NV* [1994] 4 ECR 1508 at I 1523

negative position will be extremely difficult to defend as they would be denying the impact of the ECJ's ruling. On the other hand, they will have to move towards the recognition of amiable composition if they want to follow international practice. The *Almelo* case shows that the issue of deciding a case as *amiable compositeur* is a sensitive issue. In the light of this case, the English position appears really dubious and is difficult to understand in the light of the evolution at an international level.

The 1996 Arbitration Act finally brought a clear answer. Section 46§1§b recognises that the parties may agree that their dispute is not to be decided in accordance with a recognised system of law but with such other considerations as agreed by the parties or determined by the tribunal. Section 46§1§b is expressed in very general terms, but its wording 'other considerations' is intended to be understood what is often called equity clause and an arbitration *ex aequo et bono* or *amiable composition*. Thus arbitrators are authorised to disregard express contract wordings and reach equitable results in deciding their arbitration. The DAC 1996 Report stated that 'we have avoided using in the Bill, just as we have avoided using the Latin and French expressions found in the Model Law'⁶². The terminology used was therefore a deliberate choice to ensure the widest choice of equity clause.

Section 46§1§b represents a compromise solution. Firstly, this section aims at facilitating the use of equity clause in order to be consistent with the Model Law and the general consensus in the arbitration world that amiable composition is generally accepted as a positive power to be granted to arbitrators. This section is therefore a major change into the law because it ends the uncertainty whether arbitrators could decide an arbitration on the basis of general considerations of justice and fairness. Secondly, this section is the result of intensive discussions and disagreements between the various respondents to the proposed reforms of arbitration law⁶³. But this section might prove difficult to be used in practice⁶⁴. The deliberate choice for a broad terminology 'other consideration' implies that the resolution of the dispute in accordance with 'other consideration is accepted as long as the parties have so agreed in writing. The criticism that can be made is that section 46 does not really indicate whether there has been a codification of existing principles or a substantial change⁶⁵.

⁶² DAC 1996 Report at 49

⁶³ MERKIN R. chapter 5 p30.

⁶⁴ MERKIN R. chapter 21 p80.

⁶⁵ 'While it is permissible to oust strict construction of contract wordings, any attempt to oust substantive rules of law threatens the validity of the clause itself for want of certainty, and possibly even the entire contract for ousting the jurisdiction of the courts. The problem is that section 46§1§b

Since there is no standard wording in use, the scope of the section being unclear it is not yet known how it will work in practice even if the wording is very broad. As already stated the phrase 'other consideration' is broad enough to encompass principles not recognised by any legal system⁶⁶.

To conclude, one must wait with a certain impatience cases that will raise this issue to see whether judges will follow the DAC Report in their interpretation of section 46 of the 1996 Arbitration Act.

Part 5 : The power to fix time limits for the submission of documents : statements of claim and defence, and counterclaim.

Either arbitrators (if not the parties themselves) or institutional rules fix time limits for the submission of the documents necessary for the progress of arbitral proceedings. All the time limits could be an issue dealt with within the terms of reference, if any, or in a preliminary meeting when arbitrators organise the procedure with the parties.

In England

Arbitrators have implied power to order each of the parties to deliver statements of claim and defence. These statements are similar to pleadings in a court action. The pleadings serve the purpose of informing the other party and the judge and also of clarifying the issues. Therefore, pleadings must contain a statement of the facts in summary form on which the party relies for its claim or defence. After the service of the writ, after the defendant gives the notice of intention to defend, the plaintiff must serve a statement of claim. The defendant must serve a defence on the plaintiff. The extension of deadline is possible after the plaintiff's request. After these pleadings have been delivered by each party, it is at the discretion of arbitrators to accept or refuse amendments to pleadings. To judge the amendments to pleadings, arbitrators can follow the principles of courts⁶⁷, whereby amendments are accepted if there is no serious or manifest injustice.

The 1996 Arbitration Act provides for arbitrators to have the power to establish when the statement of claim and defence should be supplied to arbitrators in

does not really indicate whether there has been a codification of existing principles or a substantial change. It merely authorises the disputes to be resolved in accordance with 'other considerations' provided that the parties have so agreed in writing.' MERKIN R. chapter 21 p80.

⁶⁶ MERKIN R. chapter 21 p80

⁶⁷ The rules practice is usually to a 14-day period.

pursuance to section 34§2sc. It only applies if the parties did not agree otherwise and indicate so in writing. Arbitrators will have now a discretion to choose the date for submitting as to the statement of claim and of defence. They are able to set the time limit for their submission. The Act does not say to what extent the arbitrators can act if the parties do not submit their documents on time. With respect to the time limit, it could be freely established by arbitrators keeping in mind that the parties need enough time to produce the requested documents. Arbitrators will use their discretion in the matter as long as they keep in the mind that the parties need some time to respond and study the documents served by the opposing parties⁶⁸.

In France

Pursuant to article 1460 NCPC, the guiding principles of court proceedings are being applied to arbitration⁶⁹.

The statement of claim (*demande en justice*), is also the initial filing of the claim as the request for arbitration. It is the initial and essential act which determines the limits of the judge's jurisdiction. It formally opens the proceedings by creating a link between the judge and the parties. The statement of claim (*assignation*) must specify⁷⁰ the nature and the object of the claim accompanied by a summary of the claim. In addition, the plaintiff submits a complete statement of the grounds he intends to base his claim on⁷¹. The date of issue of the assignation has no legal effect. The date of service on the defendant is of importance. From that date time limits start to run⁷². Within 15 days, the defendant must react appropriately by retaining counsel and informing both the plaintiff and the court accordingly. Then, the defendant must submit a written reply⁷³.

The procedure is of written type because the respective parties put into writing, in their pleadings, each point of their claim and the main points of their plea about facts and the law and finally their demand for whatever investigative measures or the production of documents they would like the judge to order. These principles mentioned above apply to domestic arbitration. In the case of an international arbitration, one may follow these rules but their implementation need not be so stringent. Indeed international arbitration proceedings are free from these time limits

⁶⁸Arbitrators may choose to follow the usual practice i.e. a 14-day deadline, which can still be used if no specific time limit has been specified.

⁶⁹Because the drafters of the arbitration decree wanted to give arbitral proceedings a judicial character. Please refer to Rev. Arb.1980 in general.

⁷⁰Article 56 NCPC

⁷¹Article 56§2 NCPC.

⁷²Article 757 NCPC

⁷³The 'assignation' served by the plaintiff to the defendant is his 'conclusion'.

to disclose written arguments. In practice, such time limits are usually set by the parties or, failing them, by the arbitrators in the terms of reference.

Pursuant to article 4 NCPC, the object of the suit is determined by the respective claims of the parties. In theory, the object should not be changed. But exceptions to the rule are accepted. The object of the suit may be modified by incidental demands as long as they are connected to the original claims by a sufficient link⁷⁴. Incidental demands may take the form of a counterclaim by the original defendant, an additional demand and third-party proceedings⁷⁵. A counterclaim must be presented to the investigating judge before the end of the fact-finding period.

Pre-trial civil proceedings are conducted by the judge in charge of putting the case in state⁷⁶. During the preparatory stage, the judge has extensive powers over the case and over the parties. His primary role is to control the investigation into the facts and to ensure the punctuality of the exchange of pleadings and of evidence⁷⁷. Again, the principles stated above mostly apply to domestic arbitration, whereas for international proceedings a liberal approach is best suited to the need of the parties. International arbitrators may accept late disclosure without having recourse to the penalties normally imposed by courts⁷⁸. But arbitrators ought to ensure that the other party has enough time to study these late documents and prepare its response.

In the ICC Rules

When a request for arbitration is received by the Secretariat⁷⁹, a copy is sent to the defendant(s) in that arbitration. In its letter, it informs the defendants that the answer to the request for arbitration should be submitted within 30 days running from the day the letter and the enclosed documents are received by the addressee⁸⁰. The 30 days-period is strongly implemented.

It has been said that 'while 30 days may be perfectly adequate in certain circumstances, there be others in which a defendant simply cannot reasonably be

⁷⁴ Article 4 NCPC

⁷⁵ Article 63 NCPC : demande reconventionnelle, demande additionnelle et intervention.

⁷⁶ Le juge de la mise en état

⁷⁷ Article 763§1 and § 2 NCPC

⁷⁸ For example: *Cour de Cassation*, chambre civile 2, 15th October 1980 in Rev. Arb. 1982. 41

⁷⁹ The Secretariat asks the defendant to pay a non refundable sum towards the administrative expenses. Appendix III of the 1988 Rules article 3 : the initial payment is of US \$ 2000; Appendix III of the 1998 Rules article 1 : the initial payment is now of US \$ 2500. This sum should accompanied each request to commence an arbitration as an advance payment towards the administrative expenses. Such payment shall be credited to the claimant's portion of the advance on costs.

⁸⁰ The delivery of which is confirmed and checked by the carrier such as DHL for instance.

expected to set out its defence⁸¹. When both parties are of different nationalities residing in different countries, when the procedural law is a foreign law different to their own, then the speed required with a 30-day period may put them at a disadvantage. The potential drawback is contrary to the principle of equal treatment of the parties. Consequently, the speed for the submission of statements must be approached with a certain amount of circumspection⁸² which is totally sound, in a personal view. It is true that in practice, when parties are residing in distant countries, the 30 days limit is not always complied with⁸³. Counsel for the parties may nonetheless request the Secretariat to lengthen it, under rule 13.2 of the 1988 Rules, when the defendant feels very hardly pressed to meet stringent deadlines to submit its Answer to the Request of Arbitration which may contain counterclaims.

The 1998 Rules do not seem to impose another procedure. The parties will be prohibited to make new claims or counterclaims outside the scope of the terms of reference after their signature unless authorised by the arbitral tribunal⁸⁴.

The Secretariat also draws the attention of the defendant(s) that if a party refuses or fails to take part in the arbitration, the arbitration shall be proceed and be put into motion by the ICA at a future session.

Under the ICC Rules, arbitrators cannot establish the time limit for the submission of these documents. If the parties are hoping to extend the 30-day time limit, the Secretariat is in charge of determining its extension for exceptional circumstances. ICC arbitrators do not intervene at this stage. The Secretariat is the link between the parties at this specific time.

In Scotland

Under the Model Law, arbitrators are entitled to fix the time limits for the submission of the statements of claim and defence⁸⁵. Under article 23 § 1, the claimant should state the facts supporting his claims, the points at issue and the relief or

⁸¹E. SCHWARTZ Perspective from the ICC in the conference *The Reform Commercial Arbitration Procedure* in London 17th and 18th February 1994 p13 (Hereinafter SCHWARTZ in CONFERENCE 1994)

⁸²SCHWARTZ in CONFERENCE 1994 p14

⁸³During my internship, I realised that difficulties usually arise because of the parties' wrong addresses, or changes of headquarters. Sometimes it is only because a party is not willing to participate into the arbitration. Thus it will do everything it can to delay the arbitration, to disregard any request from the Secretariat.

⁸⁴Under article 19 of the 1998 Rules

⁸⁵Under the UNCITRAL Arbitration Rules, arbitrators are also given wide discretion on determining the time limits for statements of claim and defence and further written statements. However as a guideline a 45 days-period is suggested by the UNCITRAL Arbitration Rules. This suggestion is non-binding and should not be seen as mandatory.

remedy sought, while the respondent should state his defence in respect of these particulars as well as the documents they consider to be relevant. It is a mandatory paragraph because the information requested is essential for the determination of the dispute. Under paragraph 2, arbitrators may also fix a deadline for the parties to amend or supplement their claim or defence during the course of arbitral proceedings. The parties are free to opt out of this provision as it is subject to their contrary agreement. They may agree that they have an unlimited right and time limit to amend or supplement their claim or defence. But, such an unlimited right could be abused and lead to dilatory practices⁸⁶. With regard to the right of the parties to amend or supplement the claim or defence, arbitrators are able to fix a time limit.

In Scottish domestic arbitration, arbiters may also define time limits unless they have been laid down in the submission agreement. Under Scottish civil procedure, after the initial writ has been served on the defender⁸⁷; defences should be lodged within the period allowed and a copy must be sent to the pursuer. Where the defender does not lodge his notice to defend, the Sheriff may grant decree. Arbiters cannot do the same unless both parties consent. A counterclaim⁸⁸ must be lodged in a separate document headed 'counterclaim for the defender'. This can be done when lodging his defences or at adjustment or after the closing of the record.

Conclusion

The submission of the different statements can either be dealt with in a procedural order from arbitrators or in a preliminary hearing during which both parties and arbitrators may agree on a timetable. It has been seen that for ICC arbitrations, the situation is slightly different. The Secretariat is the body in charge for the transmission, reception of the statement of claims and other documentation sent by the parties. It will transmit the relevant documents to the arbitral tribunal, after its appointment has been confirmed by the ICA and after the complete payment of the advance on costs⁸⁹.

⁸⁶Such an hypothesis was contemplated by the delegates see A/CN. 9.SR.323§ 8,10, 11, 17 in HOLTZMANN & NEUHAUS 1989 p664-666

⁸⁷Arbitrators may have chosen to follow court rules. If chosen by arbitrators, the OCR rule 7.1 amended by SI 1988/1978, the answer must be given within a 21 days period.

⁸⁸A counterclaim contains three parts : the crave in a form, a statement of facts on which the counterclaim is founded and pleas-in-law and it must be signed.

⁸⁹Under article 9§3 of the 1988 Rules and article 13 of the 1998 Rules. The advance on costs is required from the parties to cover the administrative expenses, the expected reimbursable expenses incurred by arbitrators with respect to the drafting of the terms of reference and the minimum of fees as set out in the scale in Appendix III. It is calculated in relation to the sum in dispute. If the amount in dispute is not quantified the provisional advance shall be fixed at the discretion of the Secretary

An interesting matter is the extent to which arbitrators have the power to refuse the diverse statements. In fact, late amendments and supplements might lead to difficulties with regard to the scope of the arbitration agreement. They might also lead to an even more sensitive matter, namely the violation of equal treatment of the parties. If a party submits its amendments and counterclaims close to the set deadline, the opposing party may lack time to consider them and prepare its response. Here lies the core of the problem as to the discretion of arbitrators with regard to amendment or supplement of claim or defence. If an entire freedom is given to arbitrators in fixing the deadlines, one has to contemplate the situation where the parties would not respect it. Then difficulty occurs. Several options are nonetheless available. In order to stimulate a quick submission of these statements, the parties may be threatened to have their proceedings terminated before they even start. This is the position adopted by the Model Law.

The ICC Rules and the Model Law⁹⁰ have a restrictive approach about late submission of statements. In the ICC 1988 Rules, the parties are made aware of the possibility to have the arbitration going on even if late submission are submitted. With the 1998 Rules, arbitrators will have the power to refuse new claims or new counterclaims after the signature of the terms of reference, unless agreement of the arbitrators. The Model Law suggests a slightly less rigorous approach. After it has been proved that the defaulting party has been duly notified and that the party has defaulted without showing sufficient cause, arbitrators shall proceed with the arbitration process without considering its default as an admission of the claimant's allegation or, in the case of an ICC arbitration, the case will be set into motion by the ICA. Under French law, the statement of defence is rather a matter dealt with by the counsel of the defendant⁹¹. After the receipt of '*assignation*', the defendant should retain counsel. This is the counsel's duty to ensure that the statement of defence has been submitted.

In order to stimulate the submission of a counterclaim, within the fixed deadline, the parties are subjected to the threat of having their counterclaim or amendments not considered by arbitrators. Arbitrators in France as the investigating judge, have the power to refuse to consider the information if not provided on time. In

General. With the 1998 Rules, there is a substantial increase for the administrative expenses from US \$ 2500 up to US \$ 75 800 when the sum in dispute is over US \$ 80 000 000, while with the 1988 Rules it was from US \$ 2000 up to US \$ 65 500 when the sum in dispute is over US \$ 80 000 000. The fees of arbitrators will also be increased with the 1998 Rules. See Appendix III to the ICC Rules.

⁹⁰Article 25 contemplating the default of party

⁹¹See J.C. WOOG *LA PRATIQUE PROFESSIONNELLE DE L'AVOCAT* 1991

the writer's opinion, the solution is certainly an interesting one to keep in mind and should be encouraged. Such a latitude may also be found in other legal systems⁹². Such a latitude given to arbitrators could have a deterrent effect on the parties, and the latter would do their best to submit the necessary documents within the fixed deadline.

Neither the ICC nor the Model Law provide for sanctions in their regulations. A personal assumption can now be considered for study purposes. Let us assume that arbitrators have the power to impose sanctions if deemed appropriate. Such a power would have to be exercised with extreme care. Arbitrators should be moderate in imposing sanctions even if the parties have deliberately disregarded the imposed time limit. Sanctions should be avoided. But the possibility of imposing sanctions should be nonetheless within the arbitrators' power. Besides there is another useful tool that will have a good deterrent impact on the parties. When a party refuses to comply, arbitrators could be led to believe that there is nothing in favour of the defaulting party and arbitrators may draw adverse conclusions from the lack of evidence or documents not submitted as required by arbitrators. This would certainly oblige the parties to avoid such a negative consequence to the non delivery of documents to arbitrators. If the parties' evidence is expected to have a good effect, it is highly advisable that the parties do their best to comply with the arbitrators' request, otherwise the contrary impact might be encountered. It has been seen above that the ICC Rules, and others such as the Model Law, grant arbitrators the power to disregard the documents submitted too late and allow them to proceed with the arbitration.

The method appears to be, in my mind, the best manner to deal with the defaulting party. It is not yet a sanction but it is some kind of beginning of a sanction. The psychological impact on the parties would be much better and certainly much more efficient. If the parties are fully aware that a late submission implies that they may be left unconsidered by arbitrators, this should certainly have a deterrent impact. And they will certainly do their best as it is in their interest.

Part 6 : The power to choose the form of statements of claim and of defence

The 1996 Arbitration Act allows arbitrators to order that arbitral pleadings be in a specific form. This section is based on article 23 of the Model Law. Section 34§2§c stipulates that they should decide what form of written statements of claim and

⁹²Surely arbitrators would have such a power as long as this specific power has not been denied by the parties or has not been withdrawn by the law applicable to the procedure.

defence are to be used. Such a power reflects the philosophy that arbitration is or should be a carbon copy of court proceedings.

Arbitrators can choose to follow the rules of court proceedings or to follow no specific rules in relation to the statement of claims and defence. When arbitrators think fit as long as the parties' rights are preserved, the accepted procedure of the service and exchange of points of claim and defences can be dispensed with⁹³. This section gives the right opportunity to discuss whether it would be sound to continue with the tradition of allowing the claimant to serve a statement of reply to the defence enabling him to have the last word in written statement for the hearing.

The present writer considers that a single document to present the parties' case could be a good solution to avoid the 'Ping-Pong reply' system which leads to several statements of claim and defences being exchanged between the parties. It follows the trend recently seen in larger arbitration proceedings whereby statements are in written form setting forth the facts relied upon, the full history of the matter, brief reference to the evidence to be put forward and the propositions of law and authorities to be utilised. Such a method allows time saving in arbitral proceedings and for arbitrators because they do not have to wait for several statements of claims and defences. Properly prepared statements, which are now often required in practice, take longer to prepare but they have the benefit of obliging the parties to set out the real problems from the beginning of their arbitration. In the end, time is gained and saved. The parties will have shorter arbitral proceedings, which will be cheaper.

The 1996 Arbitration Act is the only text under study which specifies the power to choose the form of statements of claim and statements of defence. It is nonetheless, in practice, at the LCIA, for instance, under article 6. Such a practice will certainly be developed in large arbitrations⁹⁴. For smaller arbitrations, arbitrators can always propose a similar method. The matter might be dealt with in a procedural order or in a preliminary hearing as the case may be. The power to choose the form of statements of claim and statements of defence is a specific aspect of the general power granted to arbitrators to control the procedure as they wish.

⁹³ MERKIN R. chapter 21 p 60

⁹⁴ See speeches of Reymond and Schwartz in CONFERENCE 1994

Part 7 : The power of 'investigation'

The arbitrators' powers should enable them to acquire a certain knowledge of the disputed facts, and the truth about the facts claimed by the parties. For that purpose, they are entitled to request any forms of investigation which are an expertise, an investigation / *enquête*⁹⁵ or a site inspection. All of these measures can be ordered at the parties' request or at the initiative of arbitrators. But these measures may be forbidden by the parties in their arbitration agreement.

1. / Expertise (expert report)

A difference between civil law and common law appears with the expertise used in court and arbitral proceedings. In civil law, expertise is probably the most widely used means of investigation. Experts work under court scrutiny and with the court authority. They have a wide power in conducting their investigation, as they can summon and question the parties and also obtain access to the parties' files and finally interrogate third parties. Recourse to an expertise remains optional⁹⁶ and should be undertaken by judges, if needed, for the settlement of the dispute. The same rule should apply in arbitrations. In most systems, the expert is summoned by the arbitrators. To be chosen, an expert ought to possess special or technical knowledge, to fulfil his terms of reference, which should only relate to technical matters⁹⁷ and be defined by arbitrators. An expert only ascertains a situation without giving an opinion about the legal or factual consequences. It is not binding on arbitrators.

The use of expertise in common law tends to occur in quite different circumstances. Court-ordered expertise is rarely utilised because the parties control the proceedings. More usual is the practice whereby each party appoints its own expert whose task is to convince the facts-finder that his expert's analysis is impartial and correct. These experts are called 'expert witnesses', which is a misleading expression, because they do not generally testify about facts they have personally seen. The party's appointed expert gives an opinion and is likely to submit a report or orally testify under the same conditions as any other witness. Arbitrators consider the expressed views and the explanations.

⁹⁵This is a procedure in French law whereby the examination of witness is taken in writing by or before an authorised judge, for the purpose of gathering testimony to be used on trial.

⁹⁶See article 14§2 of the ICC 1988 Rules, article 26 of the Model Law, this power is also available for the investigating civil judge and then as a consequence to a French arbitrator

⁹⁷It is usual practice to have recourse to an expert for technical matter. Sometimes in Scottish arbitration practice, the expert is asked to give legal advice as the arbiter is not always a lawyer.

In most countries, arbitrators have the right and power to appoint one or several experts. It could be considered as an inherent power unless it has been denied by the parties in their arbitration agreement⁹⁸. The power should nonetheless be carried out with particular care. Arbitrators must avoid causing unnecessary delay and extra costs. They must be careful in defining the expert's task in order to avoid a total delegation of their own responsibility and mission. Another limit is imposed upon the implementation of the right which is the respect of the parties' will. Regarding the choice of expert, it is noteworthy that the expert should have the necessary experience in the field of the arbitration, and a good knowledge of the language of the arbitration to avoid the need of translation which is time consuming and money wasting.

In England

The parties appoint their experts at common law. Arbitrators have some power like reducing the number of expert witness which each party may call.

With the 1996 Arbitration Act, arbitrators have the power to appoint experts, legal advisers and technical advisers as stipulated in section 37. It directly derives from the Model Law text (article 26). Such power can be excluded by a contrary agreement of the parties. Arbitrators can make their mind up with help from their own experts, legal advisers and technical experts. They can ask them any questions, request a report whether in writing or oral. Despite the latitude given to them with respect to experts and other advisers, arbitrators should keep in mind their duties as set out in section 33⁹⁹. It is not said in section 37 if arbitrators may define the experts' task, but it should be concluded that they would do so since the experts and advisers would be working for them and would be paid by arbitrators.

In France

The powers of arbitrators are similar to those of a civil investigating judge. Under article 10 NCPC¹⁰⁰, arbitrators have the power to order all forms of investigation legally admissible within the limits of the parties' claim. Its scope is

⁹⁸In such a situation where the parties have denied the power to appoint an expert, what would be the outcome if an arbitrator decided notwithstanding to ask for an expertise. It was proposed in a colloquium held by the ICC that the arbitrator should keep all his powers and especially the opportunity to appoint an expert or resign because he could not fulfil his mission. It was also argued that such a behaviour of an arbitrator contravening to the terms of reference could result in the annulment of the award. ARBITRATION AND EXPERTISE ICC INSTITUTE OF INTERNATIONAL BUSINESS LAW AND PRACTICE 1994 at 52-53 (Hereinafter ARBITRATION AND EXPERTISE 1994)

⁹⁹To act fairly, to give each party a reasonable opportunity of putting its case, the opportunity to comment on the contributions of each expert.

¹⁰⁰Which is applying to arbitration by virtue of the 1980 decree

wide. Arbitrators can therefore order these measures at the parties' request or at their discretion, when they deem that further information is needed. The expertise is indispensable where the understanding of certain issues requires a specialised knowledge which arbitrators do not possess. From the list of experts annually drawn up by Appeal Courts, judges or arbitrators enjoy the freedom of choice. They are nonetheless bound by the parties' wishes if expressed. If the parties unanimously refuse or request the appointment of a particular expert, arbitrators may have to comply with their wishes. An expert may request all parties and their counsel with a view to complying with the adversarial principle. It is well established that judges and arbitrators are not bound by the expert opinion¹⁰¹. As the purpose of an expertise is to clarify the facts and evidence, it can be disregarded. It is the same in arbitration.

In the ICC Rules

ICC arbitrators may appoint one or more experts, define their terms of reference, receive their reports and / or hear them in person¹⁰². The rules authorise them to appoint, but they do not specify a procedure and leave them free to proceed correctly. Arbitrators choose the issues that should be referred to the expert. Both parties may also appoint their own expert in order to maintain an 'equality of arms'¹⁰³. If a battle occurs between the party-appointed experts, arbitrators may appoint a third expert to shed light on the point at issue.

In practice, where the parties have appointed their own expert, arbitrators could feel more confused after hearing the opposing experts' views¹⁰⁴. That is the reason why the ICC Rules allow arbitrators to appoint a neutral expert. The ICC practice emphasises the constant reference to a tribunal-appointed expert directly originating from the civil law practice¹⁰⁵. But it does not close the way for the party-appointed expert of the common law system.

In Scotland

Under article 26, the Model Law provides arbitrators with the power to nominate one or more experts, define their mission and the issues to be considered. The power is nonetheless counter-balanced by a contrary agreement of the parties. Nothing is said in the provision about the parties' right to deprive arbitrators of their

¹⁰¹ See article 246 NCPC

¹⁰² Pursuant to article 14§2 of the 1988 Rules and article 20 of the 1998 Rules

¹⁰³ M. BLESSING *Le Processus Arbitral de la CCI : La Procédure devant le Tribunal Arbitral* in ICA Bulletin 1992. 20 at 36 (Hereinafter BLESSING in ICA Bulletin 1992)

¹⁰⁴ CRAIG & PARK & PAULSSON 1990 at 414-415

¹⁰⁵ SCHWARTZ in CONFERENCE 1994 p37

power¹⁰⁶. During the travaux préparatoires¹⁰⁷, the issue was addressed. If the parties wish to restrain the power of arbitrators to appoint experts and if arbitrators deem the appointment necessary, problems will occur especially if the limitation is expressed in the course of arbitral proceedings. If the parties wish to restrict the arbitrators' power, this should clearly be stated in the arbitration agreement. If such a wish is expressed too late during arbitral proceedings, a deadlock may occur if both the parties and arbitrators cannot agree. If a compromise cannot be found then the arbitration can be put at risk and arbitrators may have to resign.

Under the Model Law arbitrators have the power to require a party to give, produce and provide access to any relevant information to the expert. The provision is significant because the power is not always granted to arbitrators. It specifies the scope of their power. Finally, the combination of both types of appointments (expert witnesses and neutral experts) is allowed¹⁰⁸ as the common law expert is mentioned in paragraph 2. Following the trend of harmonisation of international arbitration practice, the Model Law contemplates the use of the common law system of experts and the civil law system of experts. This is not too astonishing as the text was indeed intended to do so.

In domestic Scottish arbitration, arbiters were able to submit a question to an expert but no specific provision was ever dedicated to this matter in the 19th century texts. If this point is not directly raised in any text, an element of solution is found with the intervention of a clerk in Scottish arbitration. When a specialist is appointed to deal with a construction arbitration or a rent arbitration, a clerk who is usually a lawyer may be appointed by the arbiter unless there is a contrary agreement from the parties. The clerk, among other duties, gives legal advice if there is a need. This practice, only in operation in Scotland, works quite well¹⁰⁹.

Conclusion

Most legal systems refer to expertise, but the main difference lies in the method and rationale behind its use.

Whether under the common law approach, where the expert is the representative of each party or under the civil law approach, where the expert is the representative of

¹⁰⁶There was a considerable debate during the travaux préparatoires.

¹⁰⁷This matter of depriving the arbitrator to appoint the expert was addressed. The Working Group and the Commission thought that the parties should be able to reject such a right due to their autonomy.

¹⁰⁸HOLTZMANN & NEUHAUS 1989 p720

¹⁰⁹For more detail refer to the paragraph dealing with this in part 5 : Miscellaneous Duties in the following chapter.

arbitrators, either approach should bring the truth and shed light on the issue in question. In fact the choice of method is left open to the parties or arbitrators. But these two systems are compatible. Indeed, in the writer's opinion, a combination of these systems is possible and despite their differences nothing prevents an alliance taking place¹¹⁰. Both systems are satisfactory. The only disadvantage of the common law system is the potential abuse that may happen if each party wants to present its expert to counterbalance the opinion of the opposite expert. This may result in an endless hearing¹¹¹. To avoid such a drawback, one can give arbitrators the power to limit the number of experts for each party, but only complying with the principle of equal and fair treatment of the parties. An interesting mid-way solution can be reached with the appointment of experts by each party under the common law system and with the appointment of a neutral expert by arbitrators. This is the position adopted by the LCIA¹¹². This institution allows arbitrators to appoint a neutral expert and does not prevent the parties from appointing their own expert. This is not the cheapest way to deal with it. Then one method has to be chosen. It is in the interest of the parties to reduce the numbers of experts. A smaller number of well selected experts will cost less and will reduce the time needed for a hearing.

To improve the use of experts, when appointed by arbitrators, his task and the issues referred to him should be set out in his terms of reference as well as the deadline within which the expert's report must be produced. To further improve the usefulness of an expert's work it can be suggested that each expert attends a meeting, if any is called by arbitrators, with a note stating the points he agrees with and the points he disagrees with, so a conclusion could be easily reached¹¹³.

2./ Enquête

In French law, the oral evidence of a witness is obtained through a procedure called '*enquête*', whereby the witness declares before a judge what he saw or heard relating to the facts in dispute. This is only for third party testimony¹¹⁴. Judges determine the facts to include in the court order. Judges may widen the scope of the

¹¹⁰View expressed by several participants in the ARBITRATION AND EXPERTISE 1994

¹¹¹Like the famous 1995 *OJ Simpson's* case in criminal matters. This example is not directly connected to our subject but it shows how the abusive use of expert can result in an endless hearing.

¹¹²Article 12 of LCIA

¹¹³BERNSTEIN & WOOD 1993 at 127

¹¹⁴It is a civic duty under French law to act as witness. Anyone refusing to fulfil this duty may be summoned by the judge to appear at his own expense and may be fined if he persists. Only third parties who have personal knowledge of the facts can act as witnesses. Relatives of the parties are not excluded, because the judge records their testimony and it is left for him to appreciate the weight of such evidence.

enquête beyond the facts stated in the court order. Judges have extensive powers in conducting the examination of witness because the right to cross-examine the witness belongs to judges. These are the rules of procedure established for courts. These rules can be applied to arbitration but with some differences. Arbitrators may order an investigation at their own discretion or if the parties ask for it. The parties could have specified in the arbitration agreement or during a preliminary hearing the scope of the power or on the contrary its limits.

In England and Scotland, such a mechanism to arrange the hearing of witness prior to arbitral proceedings is not contemplated in the texts dealing with arbitration. But there is no reason why evidence should not be taken on commission in advance of the main hearing. Such a situation would have to be considered by arbitrators and the parties during a preliminary hearing, if any, or arbitrators may order such a mechanism in a procedural order, so that time and money could be saved.

When an arbitration has already started, a witness may not be available for future hearing, then his evidence shall be taken on commission on advance. But, if the arbitration has not yet been commenced, what would happen ?

In *the Galloway Water Company* case¹¹⁵, the Scottish court decided to appoint a commissioner to take the evidence of an engineer whose evidence was of vital importance and who was due to take up an appointment abroad which would detain him abroad for several years. Even if the arbitration was not yet commenced, and in the view of the importance of his technical evidence, the court took the view that this evidence should be available for the future arbitration¹¹⁶. Such a possibility to obtain potentially reliable evidence in advance of the hearing would ensure that arbitrators have all information and evidence in order to decide the case after having given every opportunity to the parties to present their case.

3./ Site inspection

Another way to obtain evidence is to resort to an inspection of the subject-matter. Its purpose is to enable arbitrators to understand and assess the evidence put before them. This is especially true for construction arbitration or commodities arbitration where arbitrators inspect the cargo or consignment. Unless there is a contrary express provision by the parties, arbitrators have an inherent power to inspect

¹¹⁵*The Galloway Water Company v Alastair Macpherson Carmichael* 1937 SC 135

¹¹⁶In allowing a commission in the present case we wish to make it plain that it is only in circumstances of a very exceptional kind, of which the present case is an example, that the court will grant a commission to take evidence where there is not an action before it or an action immediately pending'. *The Galloway Water Company v Alastair Macpherson Carmichael* 1937 SC 135 at 140

the subject-matter, any property or thing in the possession or under the parties' control. They have at their entire discretion the organisation of the site inspection. They have to notify both parties and their advisers of the venue and date since they have to comply with the parties' equality. This means that every inspection should be conducted in the presence of the parties and / or their advisers. No specific provision is dealing with the matter in the texts under study.

Such a power appears to be inherent as long as it is not expressly denied by the parties in their agreement. In deciding whether to go on with a site inspection arbitrators should decide if it is appropriate, necessary and not too costly in time and money. The site inspection can facilitate decision-taking and reduce the time spent in hearings.

4./ The discovery of evidence

Arbitrators can also order the parties to produce their evidence, proof and all documents related to the subject-matter.

In civil law countries, documents are used to support or substantiate a matter of law or facts advanced by a party. The burden of proof rests on the parties : they must disclose all documents which they consider support their claim or defence. This implies that the parties must disclose to their opponent all documents which they intend to submit. Most countries follow the trend whereby judges are permitted to order the disclosure of documents held by the parties and can even order a third party to disclose their document against their will. But limits are imposed. If a party believes that its opponent has interesting evidence in its possession that might be useful to its case or even damaging to its opponent, the court will not authorise that party to obtain it. Here lies a major difference with common law principles¹¹⁷. One difference between judges and arbitrators appears because judges have coercive power to compel compliance whereas arbitrators do not¹¹⁸. Judges have also the ultimate power to determine the relevance of the evidence submitted by the parties. As the disclosure of documentary evidence has become increasingly common in international arbitration therefore the possibility for an arbitrator to evaluate the relevance of evidence is significant.

¹¹⁷At common law, it is within the professional duty of a lawyer to inform its client that the opponent has interesting evidence which would help its case or even damage the opponent's case. In England, there is an obligation to disclose evidence and a right to discovery under this line. In Scotland, there is no obligation to disclose anything.

¹¹⁸It will be discussed latter in this section in relation to the limits of the arbitrator's power.

At common law, evidence can be obtained through the discovery process whereby all parties disclose documents to the opponent. The discovery process does not require the intervention of judges. Discovery is not an incident of the trial as in civil law countries, but it is the right and duty of the parties with which they must comply. The problem of submitting evidence is mostly centred around the issue of producing all documents the parties have at their disposal. Even if these documents are unfavourable to their claims or defences they will be produced. Both parties prepare and exchange a list describing the documents. The structure and organisation of the taking of evidence is influenced by the parties' wishes.

In the end, arbitrators are not obliged to choose between the two methods or any system of law known in the place where arbitration is taking place. Indeed they may create a complete tailor made procedure which would fit best the parties' interests.

In England

What documents required to be disclosed was settled in accordance with the Peruvian Guano test¹¹⁹. In domestic arbitration, each party's solicitor exchanged a list of all documents in his client's possession or power. Arbitrators only get involved when a party fails to disclose these required documents or when a third party was forced to produce documents by way of subpoena¹²⁰. For international arbitration, the tendency was to ask the parties to submit specific documents and arbitrators would have a wide discretion in order to restrict the extent of discovery.

The 1996 Arbitration Act allows arbitrators to choose which documents or classes of documents if any should be disclosed between and produced by the parties and at what stage. Section 34§2§d gives them wide powers with regard to what is usually called the discovery of documents. This sub-section should be read 'subject to rule of privilege, preventing disclosure of documents, which are privileged as between lawyer and client or confidential documents'¹²¹. Arbitrators will use their discretion as to which documents should be disclosed and as to the quantity of documents to be disclosed. This new power answers to past abuses. The practice of general discovery was abused and led to increasingly voluminous discovery in arbitration, which

¹¹⁹Any document is disclosable which is reasonable to suppose contains information which may enable a party either to advance his own case or to damage that of his adversary, or if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences'. *Compagnie Financière et Commerciale v Peruvian Guano Co* (1882) 11 QBD 55

¹²⁰ Pursuant to section 12 of the 1950 Arbitration Act

¹²¹ MERKIN R. chapter 21 p 60

obliged arbitrators to consult huge amounts of documents not always relevant. Such a negative use of general discovery forced arbitrators and institutions¹²² to limit it. If arbitrators feel that the parties produce too many irrelevant documents, they should be able to bring them back into the right path. The provision should succeed in reducing the abuse of general discovery. Such a method would combine the positive aspect of the discovery without its negative aspect. Such a use should be encouraged and developed. The 1996 Arbitration Act gives wider power to arbitrators as to discovery. The power is consistent with the philosophy that arbitrators should organise and run their arbitration in the way they deem appropriate. Such approach is definitely an advance in the way arbitrators will be dealing with a case. In leaving the arbitrators to be the master of their case, arbitration should be more efficient.

In France

The system of discovery of documents does not exist, as such. Nevertheless, pursuant to article 11 NCPC, the parties must co-operate in producing proofs and if they have any item of evidence in their possession, arbitrators may compel them to disclose these documents. Article 132 NCPC provides that the party introducing a piece of evidence must transmit it to the other party. This supposes that it must be spontaneously done. Failing that, judges have the power to order such transmission pursuant to article 133 NCPC.

With articles 138 to 142 NCPC, judges may order a party, even a third party, to disclose against its will if necessary a document that is decisive. In a civil law country, ordering a party to produce evidence is rather seen as a trial incident for which the court's intervention is necessary upon the request of a party. In relation to the discovery of documents, the arbitrators' power is more or less the same as the judges' power with the only exception of coercive powers. To a certain extent, the fact that judges may order a party to disclose documents¹²³ could be considered as being closer to the common law tradition of discovery.

To my mind, the idea is not so contradictory. In fact, the kind of spontaneous disclosure of documents by the parties is really similar to the common law discovery. Indeed the purpose is to reach the truth even if the means of reaching it is different. Even if both systems differ in their approach, method and spirit, the result is equivalent in the sense that documents should be exchanged between the parties. The

¹²²Like the LCIA Rules (article 6§6) which require the parties' statements of case to be accompanied by copies of all essential documents on which the parties will rely.

¹²³ Under articles 138-142 NCPC and articles 10-11-12 NCPC.

difference lies in the role of judges / arbitrators who play an active role in the type of discovery.

In the ICC Rules

The production of documents is rather straightforward as it is contemplated in the ICC Rules. Pursuant to article 3 of the 1988 and 1998 Rules, the claimant should produce all documents upon which he relies along with his request for arbitration to the Secretariat. Similarly, the defendant should produce all documents along with his answer to the request for arbitration. The Secretariat is in charge of transmitting the file and documents to arbitrators after complete payment of the advance on costs¹²⁴ either by the parties or by the claimant only if he is substituting to the defendant. Generally speaking, the parties are usually highly encouraged to present their case and evidence in written form to reduce to a minimum the time spent in hearings¹²⁵. Where a party does not voluntarily produce a document, arbitrators are entitled to request its production (either at their discretion or at a party's request). However, the ICC Rules do not vest arbitrators with coercive power to compel the production of document nor do they vest arbitrators with the power to impose a sanction for the failure to comply with their order.

In Scotland

Article 24§3 of the Model Law requires the discovery of documents. Pursuant to the article, all statements, documents and other information like the experts' report supplied to arbitrators by one party should be communicated to the other party. The provision really insists on the exchange of documents between the parties. It is vital for the good development of arbitral proceedings and to ensure an equal treatment of the parties. Article 24§3 talks about the exchange of documents between the parties but it says nothing about the potential power of arbitrators to order the production of documents to them or to the parties. Arbitrators can get a court order compelling production of documents. They only have the power to specify the time within which documents, exhibits or other evidence should be produced.

In Scotland, there is no automatic discovery of evidence. The parties may recover specified real and documentary evidence which is relevant and necessary to the issue in dispute. They lodge a specification of the types of documents they are

¹²⁴ Under the 1988 Rules, the first half of the advance on costs should be paid before the transmission of the file to the arbitral tribunal while under the 1998 Rules the full payment of the provisional advance on cost is conditional to its transmission to the arbitral tribunal.

¹²⁵ SCHWARTZ in CONFERENCE 1994 p35

seeking to recover along with the pleadings or at least at the closing of the record. The list will usually describe the type of items sought. If arbitrators are satisfied with such a request they will recommend to a Scottish court that an order be made for recovery of these documents. Pursuant to article 27 of the Model Law, international arbitrators or a party with the approval of arbitrators may request assistance from either the Court of Session or Sheriff Court in taking evidence and recovering documents.

Conclusion

Unless the parties have made special arrangements for the taking of evidence, arbitrators are free to determine how they want to receive evidence without being bound by any rules of evidence and rules of procedure. Arbitrators have an entire discretion as to how they want to deal with it. They can either choose one set of procedural rules, or blend the civil and common law approach or make their own set of rules. There is a growing tendency¹²⁶ to supply most evidence in writing, as under civil law tradition. In the writer's view, it has some significant advantages. If studied before hearings, the evidence in writing can conduce to the reduction of time wasting. Having shorter hearings is certainly in the interest of all parties. The obvious drawback with the evidence in writing is that it usually increases the preparatory arbitrators' workload. But it is worth it. Irrespective of the arrangement made with the parties, arbitrators have to comply with the principle whereby the parties are given a full and fair opportunity to comment upon the evidence.

The limits of the arbitrators' power as to discovery appear when one party refuses to comply with their order to disclose. The difficulty arises with respect to sanctions they could impose if they were state judges. French law authorises¹²⁷ judges to impose a fine if one party withholds an item of evidence after the party's request or at their own request. Besides, French law also allows judges¹²⁸ to use the penalty fine if a third party refuses to disclose an item of evidence where there is no lawful impediment. Do arbitrators possess such a power ? The answer to the question is clearly negative. Since arbitrators receive their powers from the arbitration agreement, which are hence of contractual origin, they cannot be entitled to similar powers as those of judges whose powers originate from the state. As they are without full judicial powers they have limited powers. Towards the parties to arbitration, when one party refuses to comply with their order, arbitrators can only penalise its refusal by

¹²⁶ In the 1988 ICC Rules (articles 3 and 4), in the Model Law, in the LCIA Rules (article 6§6).

¹²⁷ Article 11 NCPC

¹²⁸ Article 11 NCPC

drawing all consequences of the defaulting party's refusal. Towards third parties, arbitrators cannot similarly compel them to disclose an item of evidence. When state judges exercise their powers to compel a party to disclose its piece of evidence, judges exercise their judicial powers¹²⁹ because they also exercise a power of police. The judicial power implies that the judges' decision have an executory force which can only be carried out by a representative of the state. Arbitrators cannot be the holders of such power, as their powers emanate from the parties¹³⁰. For the above reasons, arbitrators lack coercive powers to compel the production of evidence in the possession of third parties even if it is relevant to the matter in issue. The only type of coercive powers granted to arbitrators applies to the parties to arbitration. If the disclosure of evidence possessed by third parties is significant to the case then arbitrators at the parties' request or of their own initiative may ask national courts to assist them with the matter¹³¹.

Limits as to discovery can also be related to late disclosure of evidence due to the difficulties appearing with regard to their acceptance. Strictly speaking these late items, especially those disclosed at the end of the hearing, could be refused by arbitrators. Such a refusal could be done to the disadvantage of a party whose delay is due to circumstantial events and independent from their will. If arbitrators believe these pieces are relevant and essential to the issues at question they may want to admit them. Consideration should be given to the following points. First, if there was a deadline which the defaulting party did not comply with because of circumstantial events or *force majeure* but not for dilatory purposes, then arbitrators could admit these pieces of evidence. Secondly if the evidence has a real significance, arbitrators should ask the opposing party to study it after having granted it a further delay to prepare its answer. In such a situation, arbitrators must be extremely careful to comply with the right of defence and the opportunity to present its case and defence for the opposing party. A good solution would be for arbitrators to be prepared to concede a further delay¹³² in order to prevent the defaulting party from being prejudiced. In theory, nothing obliges arbitrators to be strict with delays if an item of evidence is relevant and significant for the case. During the preliminary meeting, if any,

¹²⁹C. JARROSSON in *ETUDES OFFERTES A PIERRE BELLET* 1991 p245 at 269 (Hereinafter JARROSSON in *ETUDES* 1991)

¹³⁰'L'arbitre doit donc se contenter d'un pouvoir juridictionnel écorné. Son pouvoir s'arrête à la lisière de l'impérisme.' JARROSSON 1987 p104

¹³¹This matter shall be developed in the Title Three of the thesis.

¹³²Which could be assimilated to a notion of useful time during which the arbitrator would be prepared to accept late evidence.

arbitrators ought to be clear about compliance with deadlines if they want the parties to know what they put at risk. Moreover, arbitrators should specify whether or not they will consider admitting or refusing any late evidence. Once the parties are aware of this fact, it will be at their own discretion, that they submit late evidence. In international arbitration practice, the trend is to accept late evidence and the tendency is also to avoid recourse to sanctions or fines.

To conclude, despite the striking differences between the civil and common law procedural aspects, a particular trend of harmonisation¹³³ appears in international arbitration practice. One can imagine an international arbitration taking place in a civil law country where the parties from common law countries decide to apply the discovery process. To my mind, this is not impossible at all. As long as recourse to the discovery process is not expressly forbidden by the procedural law of the country where the arbitration is taking place; the parties should be free to choose how to implement it. Besides, with regard to the implementation of discovery in an international arbitration where it is not contemplated in the regulation, in France or in the ICC Rules for instance, the parties have sometimes required it. For study purpose, let us consider the following generalisation of discovery in arbitral proceedings.

The generalisation is a tangible proof that a certain harmonisation between the common law and civil law system is happening. Do we have to be afraid of it ? Obviously not. International arbitration practice has been able to do that, which is a great achievement.

If the discovery process is to be generalised in international arbitration practice, a certain care should be brought in order to avoid its drawbacks such as the fishing expedition. For that purpose, a certain discretion and power should be given to arbitrators in order to set the limits of discovery (which kind of documents should be produced, the quantity of the documentation to be produced, for instance). As has been said 'international arbitrators, in their discretion, often order discovery of critical documents, but generally will not allow broad US style discovery requests. Document requests for broad categories of information will be usually resisted strongly by both litigants and arbitrators'¹³⁴. If the discovery in an arbitration is carried out in

¹³³This idea has been presented by B. Goldman in GOLDMAN in ETUDES 1991 p219-243 and DE BOISSESON in TAKING OF EVIDENCE IN INTERNATIONAL ARBITRAL PROCEEDINGS 1989 p87-97

¹³⁴A.S RAU & E.F SHERMAN in Tradition and innovation in international arbitration in 30 Texas Int. Law Journ.1995. 103

accordance with the pattern seen above, arbitration will not be criticised for becoming like litigation.

Part 8 : The power as to hearing

For international arbitration, it is unusual for arbitral proceedings to be concluded without at least one hearing¹³⁵ during which the parties and their representative should have the opportunity to present their case. Most rules and legislation provide for at least one hearing to take place at the parties' request or at the arbitrators' discretion. Whatever may be the parties' decision, arbitrators are bound to respect it. If the parties did not reach an agreement on or did not discuss the matter, it is thus at the arbitrators' discretion to call for a hearing and to organise it.

Once arbitrators have the power to hold an hearing, they should then be able to organise the hearing, determine its date, its place, and its time. When determining these points, arbitrators should keep in mind the parties' state of origin, their availability, and, so far as possible, their convenience in being able to present their case. The 1996 Arbitration Act follows the trend: arbitrators have the power to set the date of the hearing. They may choose to sit on any day of the week, and in a particular country which suits every person taking part in the arbitral proceedings according to section 34§2§a. For an ICC arbitration, the Secretariat may be asked by arbitrators to provide them with a hotel suite for the purpose of an hearing, or a room at the ICC headquarters in Paris, if Paris is the place of the arbitration. Article 20§1 of the Model Law says that the place of arbitration shall be determined by arbitrators having regard to the circumstances of the case, including the parties' convenience while the 1996 Arbitration Act does not refer to the parties' convenience¹³⁶. The Model Law is really the only one to suggest that arbitrators ought to take into consideration the parties' convenience. In other statutes, consultation of the parties' convenience is implicit. Arbitrators should really pay great attention to it, since otherwise the parties may feel that they have not had a real opportunity to present their case.

Once the date, the place, and the time of the hearing are chosen, arbitrators ought to inform the parties and their counsel and give them reasonable time to prepare

¹³⁵ With the exception of 'documents only' arbitration.

¹³⁶ The DAC 1996 Report does not mention it because 'this is a consideration subsumed under the general duty of the tribunal in clause 33'. DAC 1996 Report § 169 p39

their case. Arbitrators should be careful in dealing with details relating to the room where the hearing should take place¹³⁷, and the amount of time needed¹³⁸.

Once these important details are dealt with, arbitrators should ask the parties to provide them with a list of witnesses, they wish to call at the hearing, or any written testimony by a witness.

Testimony

By testimony is meant all statements of evidence of a verbal nature by witnesses: the parties' personal declarations on the stand as well as those of witnesses and experts. As a general rule, oral evidence has a considerable weight in common law countries whereas in civil law countries it only has a secondary weight¹³⁹. Another point of importance is the role of judges vis-à-vis oral and written proof : they have much more latitude with regard to assessing facts in hearing oral testimony than in matters of written evidence. Trial judges have a major power in deciding whether or not a witness should testify. They direct the witnesses' testimony and hear them in the order they choose¹⁴⁰. Hence they ask the questions to witnesses, and the parties are only entitled to request if they could put certain question to witnesses. They may agree, or may refuse to ask the questions submitted by the parties.

At common law, after the oath is administered to the witness, the examination of the witness is carried out by both parties' counsel. In theory, the party producing the witness will take him first through his evidence, that is, the evidence in chief¹⁴¹. In practice, it seems that oral examination are not so often used as such. Oral cross-examination of witnesses are done because the parties usually lodge the statement of witnesses in a written form. This may save time and cut down on the length of oral examination. The opposing party will then cross-examine the witness. The first

¹³⁷It is usually advised to choose a spacious room so as to allow the arrangement of tables for the parties, their counsel, the arbitrators, and for the witnesses. It is highly recommended to choose a lighted room with view on the outside world. These details will then favour a friendly atmosphere.

¹³⁸In practice, it is highly advised to be realistic and expect that the hearing will last always twice the time expected or even more than that. Specialists of arbitration practice suggest that when 3 or 4 days apparently suffice it is advisable to schedule the hearing for 2 weeks or more because the parties and their counsel should not feel pressed by time constraints, that witnesses examinations take long time, discussions on details are always important to understand the subtleties of the case.

¹³⁹Indeed there is a hierarchy between written and oral proof in civil law countries. Such hierarchy originates from the theory that the creation of the beginning of proof arises with written evidence. Hence, the statements of evidence by witnesses are most of the time secondary to written evidence except when they replace written evidence.

¹⁴⁰Pursuant to article 208 NCPC

¹⁴¹During the evidence in chief, the purpose is to elicit from the witness evidence to the issues which is favourable to the party's case.

purpose of the cross-examination is to weaken the witness's evidence and to demonstrate that the witness is dishonest or unreliable for instance. Consequently, the aim is to undermine the support that this evidence provides to the opponent's case. The second purpose is to develop the evidence favourable to the cross-examining party. After cross-examination, the party who called the witness may re-examine him in order to clarify and / or expand any issues raised in cross-examination. In examination in chief and cross-examination, counsel ask questions which the witness is bound to answer. The role of judges is limited because they should not interfere as such in the course of the examination in chief and cross examination. Judges may only intervene to disallow insulting or annoying questions and disallow irrelevant questions. Or they may intervene when it is necessary to clear up a point. The role of a common law judge is then different from the pro-active role of the civil law judges with respect to testimony. Besides these two methods seen above, an arbitrator can always choose a tailor made procedure which contains elements of both traditions depending on the role he wants to play either the leading role with the civil law tradition or a more passive role in the common law tradition.

In England

The role of arbitrators during the testimony of witnesses is rather limited. Sometimes they may intervene during the evidence in chief of the witness if their questions or queries were not answered during its course. They would rarely intervene in the course of a cross-examination as the golden rule is to leave the advocate alone. Nonetheless their role is important because they should ensure that the witness is fairly and courteously treated. Their intervention is justified whenever they think that the bounds of fairness are being exceeded.

The 1996 Arbitration Act does not modify the prior law¹⁴². The 1996 Arbitration Act authorises arbitrators to choose whether and to what extent there should be oral and written evidence or submissions under section 34§2§h. This provision restates a principle familiar to a certain form of English arbitration such as document-only arbitration¹⁴³. The provision implies that there may be cases when oral evidence is unnecessary and where a dispute can be resolved with documents-only¹⁴⁴. Such a provision, allowing a certain latitude between having oral hearing or not, gives arbitrators the power to decide whether or not the circumstances of the case require a hearing or not. It consequently gives them the power to choose whether an oral

¹⁴² It repeats section 12§2 and 12§3 of the 1950 Arbitration Act.

¹⁴³ MERKIN R. chapter 21 p61

¹⁴⁴ Which is the case of consumer arbitrations. see BERNSTEIN & WOOD 1993

hearing is needed after careful consideration of the circumstances of the case. The present writer believes that such a provision brings an end to the idea that the parties requiring an oral hearing in an English arbitration should be entitled to have it on the grounds of natural justice. Now arbitrators will be able to disregard the party's request without being accused of breaching the principle of natural justice. It is therefore an important provision which gives more latitude to arbitrators to accept or refuse the party's request for an oral hearing. It should have a positive impact on arbitration practice, and it should help to prevent the parties using oral hearings as dilatory tactics or as the weapon to threaten their opponents with further costs. It should help arbitrators to direct arbitral proceedings as they deem appropriate in accordance with the circumstances of the case without dilatory tactics and the threat of the parties. Arbitrators now have a weapon which enables them to lead arbitral proceedings according to their wish and their idea. This is undoubtedly one major asset for the 1996 Arbitration Act.

In France

The parties can appear before judges but are not regarded as witnesses and above all without their statements having the probative value attached to normal testimony. In an arbitration, arbitrators can hear the parties, experts and witnesses, without administering the witness's oath¹⁴⁵. Arbitrators alone assess the probative value of evidence. For an international arbitration taking place in France, nothing prevents them from regarding the parties as potential witnesses. Even if oral evidence is seen as inferior it is frequently used in arbitral proceedings. It is up to them, if not expressed by the parties, to decide when oral evidence shall be put forward and the way in which the witness will be questioned.

In international arbitration proceedings taking place in France, it is not impossible for a witness or expert to be questioned by the parties in an informal manner, even if it is contrary to the spirit of civil law. This is simply because an international arbitration can be denationalised and not be dependent upon French law. As judges, arbitrators decide whether a witness or expert has to appear in person. Arbitrators also have the discretion to refuse to hear a witness or expert even if a party has requested them to do so¹⁴⁶. Despite their wide discretion, arbitrators should pay extreme attention to the rights of the respondent in issuing their directions. In international arbitration, arbitrators can follow the pattern presented above whereby

¹⁴⁵As arbitrators are private persons, who will be granted specific power for the rendering of a arbitral award, chosen by the parties they cannot administer the oath of witness.

¹⁴⁶DE BOISSESON 1990 p745

they will conduct the hearing, hear the parties in the order which they have chosen, and put questions to witnesses. But international arbitrators are free to disregard French rules for the eliciting of testimony and give the parties a free rein and therefore allow them to intervene more into the witnesses' testimony.

The limits for French arbitrators relate to the impossibility of administering the oath when receiving testimony. Another limit relates to the situation when the witness refuses to testify or appear : arbitrators cannot force him to do so, nor can they impose sanctions upon him. The reason is again their lack of coercive powers. As arbitrators are private persons vested with some powers by the parties, it is impossible to grant them coercive powers without putting at risk other persons who are not directly involved in the arbitration.

In the ICC Rules

The examination of witnesses is usually quite informal¹⁴⁷ but follows ideally some rules set up by the parties in the terms of reference. Either they may want a relaxed type of examination or they could always decide to conduct the witness's examination as in court proceedings. No special method of witness examination is imposed by the ICC Rules. In fact they provide great freedom with regard to the witness's examination. It usually depends upon their background if the parties did not lay down the rules in their arbitration clause. Therefore a common law approach or civil law approach or a blend of them both is possible for an ICC arbitration. Whatever approach is chosen, it should enable arbitrators to evaluate and determine the reliability and the credibility of each witness and statements made. Here, arbitrators should be encouraged to preserve the 'desideratum of informality in commercial arbitration'¹⁴⁸.

If they want to play an active role they should follow a civil law approach whereas a common law approach would allow a more passive role. The civil approach implies that general questions enable the witness to deliver an extensive statement about facts. Further questions would enable them to go into details. The cross examination would be carried out afterwards¹⁴⁹. If a common law approach is preferred the counsel would ask the questions first and the arbitrator asks complementary questions afterwards if he feels the need to do so. ICC arbitrators do not threaten

¹⁴⁷CRAIG & PARK & PAULSSON 1990 p399

¹⁴⁸CRAIG & PARK & PAULSSON 1990 p400

¹⁴⁹Contrary to the rumour that cross-examination is anathema to continental arbitrators, the authors experience has been that most ICC arbitrators, irrespective of their origins, allow counsel a fair measure of cross examination on all significant issues brought up in the witness's main statement'. CRAIG & PARK & PAULSSON 1990 p401

criminal sanctions and the administration of oath is rarely contemplated but the usual trend is to ask witnesses to declare that they will, 'upon their honour and conscience, speak the truth, the whole truth and nothing but the truth'¹⁵⁰.

The oral evidence of experts is usually presented before arbitrators. This occurs irrespective of the parties' origins as observed by practitioners¹⁵¹. It is fair to enable the parties to examine and cross-examine the neutral expert of the tribunal or the party experts.

In Scotland

Oral evidence is normally used in arbitration proceedings. The witness hearing takes place normally after the pleadings have been finalised and before the oral legal arguments are made¹⁵². The parties have the right to choose the witnesses they wish to call unless they have dedicated the power to the arbitrators. Pursuant to article 24 of the Model Law, the parties are entitled to have a hearing of witness. As it has been seen above it follows the general trend allowing arbitrators to hold the hearing either at the parties' request or at their own discretion. The real interest of the provision rests in the second paragraph as it expressly specifies that the parties should be given sufficient advance notice of any hearing¹⁵³.

Under Scots law, arbiters did not have such a discretion. The choice regarding the taking place of an hearing only belonged to the parties¹⁵⁴ and the refusal of a hearing from the arbiter will provide grounds for reduction of the arbitral decree. Arbiters need not administer the oath, although in practice they do. As to the examination of witness, arbiters may ask questions after both the parties have done so, but in no way should they conduct the examination themselves. As to the limits of their power, there is no obligation for the witness to appear unless an order of the court has been obtained to cite such a witness. Scottish courts have the power to compel the appearance of witnesses within the UK.

Conclusion

A constant limit to the arbitrators' power is clearly the lack of coercive powers with a view to compelling the attendance of witnesses at the hearing and answering

¹⁵⁰BLESSING in BULLETIN 1992 p40

¹⁵¹CRAIG & PARK & PAULSSON 1990 p403 and also BLESSING in ICA Bulletin 1992. 41

¹⁵²There may be pleas to the relevancy which are debated before evidence is led.

¹⁵³A fixed time period was not proposed as it was considered as inappropriate in the great majority of cases. A/CN. 9.245 §82 in HOLTZMANN & NEUHAUS 1989 p680

¹⁵⁴*Longmuir v Sloan* (1840) 2 D 877 at 879 'It is not for the arbiter but for the parties to say whether all hearing is to be dispensed with'.

questions. This limit precisely shows the limit of their judicial power and underlines the need of national courts' assistance.

The arbitrators' role depends upon the chosen approach : either a civil law or a common law approach. Quite often practice shows a combination whereby arbitrators and the parties' counsel respectively play an active role. First, arbitrators would allow the parties to question the witnesses under their active supervision. The practice whereby arbitrators play a more and more important part during the hearing, their growing control over expert witnesses, the frequency of the appointment of experts reveals a trend of harmonisation whereby the differences are now tending to blur¹⁵⁵. Whatever the rules of procedure are, arbitrators should always have entire control over the procedure in relation to a witness giving oral evidence, cross-examination and re-examination of a witness, if necessary, when they deem that such evidence or examination is unlikely to serve the purpose of clarifying the case. They should always be able to assess the quality and the relevance of the proof presented before them by witnesses.

A trend of harmonisation in international arbitration has been observed whereby a strict approach is not absolute anymore. A general conclusion can be reached at this stage of the chapter. Even if counsel and arbitrators have a civil or common law background they may utilise a procedure with which they are not familiar. Due to the various origins of the actors in international arbitrations, the procedural rules from common and civil law are blended in a procedure combining the best of both worlds. Is this harmonisation a positive or negative thing ? When Mr Reymond expresses his fear that civil procedure will gradually turn into some sort of 'uniform procedural fast food'¹⁵⁶, his statement is quite extreme. In the writer's view, such harmonisation is certainly a good thing as one can utilise the advantages of each system and avoid the drawbacks of each system. Such a view may seem utopian, but it would be a great opportunity to do it.

At international level, it is quite common to have a written submission of the pleadings and the connecting documents done in the civil law method. There is a growing trend to have the witnesses' statements and the experts' report submitted to the opposing party before the hearing and for the person to be examined and cross-

¹⁵⁵Taking of evidence in international arbitral proceedings ICC DOSSIER OF THE INSTITUTE OF INTERNATIONAL BUSINESS LAW AND PRACTICE 1989 p109 and REDFERN & HUNTER 1991 p349

¹⁵⁶C. REYMOND Civil law and common law procedures : which is the more inquisitorial ? A civil lawyer's response. 5 Arb. Int. 1989. 357 at 368

examined in the common law method. Thus, their early submission obviously requires that both parties be given enough time to prepare for the hearing after the communication of these written documents. Here the arbitrators' role is to find an organisation to fit the needs and desires of both parties. The use of the common law method is quite common even if arbitrators or counsel have a civil law background. It means that even if arbitrators or counsel are civil lawyers, they may conduct the examination of witness under the examination and cross-examination method. The Swiss legislation¹⁵⁷ follows the harmonisation principle and authorises the use of either the civil or common law method or both. The LCIA provision¹⁵⁸ also underlines this harmonisation in allowing the witness to be questioned by each party or their legal practitioners under the arbitrators' control who can also question him at any stage of the examination. It appears with certainty that harmonisation is already taking place and its interest is well recognised. Another proof of the harmonisation of the traditional dichotomy between civil and common law is found in the exercise of the arbitrators' discretion in structuring the oral testimony. In the end, the arbitration process may be a combination of the civil and common law from beginning to end, depending upon the origin of the parties, their counsel and arbitrators. To sum up, the initial part of an international arbitration can follow the continental style while the trial part can follow the common law style or a combination of both styles or finally a tailor-made one.

Part 9 : The power to order interim measures of protection

Interim measures of protection are designed to serve several aims : preserving a given factual or legal situation (conservatory measures *stricto sensu*), stabilising the parties' relations during arbitral proceedings, and conserving a piece of evidence. Their main purpose is to ensure that the *status quo* between the parties is preserved before the rendering of the final award. They are usually temporary in nature, they cannot exceed the protection requested by the parties and they are restricted by the scope of the underlying nature of the dispute.

The power of arbitrators to order them is limited. Firstly some legal systems forbid or impose limitations in favour of the exclusive power of state courts. Secondly, their power is limited by the parties, since it is possible to order them only where the subject-matter or the piece of evidence is within the parties' hands or their

¹⁵⁷ In its article 184§1 whereby the arbitrator decides how the witnesses are to be examined either by himself or by counsel.

¹⁵⁸ Article 11§3 of the LCIA Rules

control. Accordingly, arbitrators cannot order interim measures which require a third party's involvement for their enforcement. Arbitrators are powerless towards third parties and the recourse to state courts is therefore compulsory.

When requested by a party, arbitrators must first and foremost check if they have the power to order such interim measures¹⁵⁹.

In England

The 1996 Arbitration Act gives many details as to their power. Arbitrators are now empowered to order the claim or counterclaim to provide security for costs of the arbitration (i.e. cost of the arbitration and the parties' legal cost). The provision (section 38§3) brings a significant change to the prior law because the court previously had such a power. Indeed the parties had to apply to the High Court for an order under section 12§6 of the 1950 Arbitration Act, which was quite controversial¹⁶⁰.

Under section 38§3, they have the power to order security for the costs of the arbitration¹⁶¹ when requested by a claimant, if he is a resident in the UK, or if a corporation or association is incorporated or formed under UK law. Arbitrators have an exclusive discretion to order security for the costs of arbitration¹⁶². In the event of the parties stating in their arbitration agreement that they do not vest the arbitrators with the power to order security for the costs of arbitration, it will be exercised by the court. Thus arbitrators may exercise their discretion. The provision states in a negative manner the ground according to which the order can be made¹⁶³. Here the costs of arbitration are not restricted to the legal costs of the parties, but they also involve the arbitrators' fees and expenses and the fees and expenses of any arbitral institution concerned¹⁶⁴. The provision is put in negative terms to explain the exercise of the power¹⁶⁵. In short, security for the costs can not be ordered solely on the ground that

¹⁵⁹This verification will be conducted under the direction of the applicable rules of procedure - whether rules of a national law, of an arbitral institution or those specially laid down by the parties in their arbitration agreement.

¹⁶⁰See in chapter 3 Part 1 of this thesis, the Ken Ren case which attracted a great deal of criticism for making an order in respect of a foreign arbitration even in exceptional circumstances.

¹⁶¹Which include the arbitrators' own fees and expenses under section 59 of the Act.

¹⁶²By way of a cash deposit in a bank, bank guarantee for the respondent's anticipated costs for which the claimant may become responsible if he loses the arbitration.

¹⁶³By way of cash deposit in a bank, bank guarantee for the respondent's anticipated costs for which the claimant may become responsible if he loses the arbitration.

¹⁶⁴As stipulated in section 59 of the 1996 Arbitration Act.

¹⁶⁵I.e. the power may not be exercised on the ground that a party who is an individual is ordinarily resident outside the UK, or that a company or association was incorporated or formed, or in either case is managed or controlled from outside the UK.

the claimant is foreign¹⁶⁶. No other indication is given as to how arbitrators shall exercise their discretion apart from the compliance with the rules of fairness, speed and economy. Therefore, a flexible discretion is certainly authorised. It has been said that their discretion may well 'diverge from that which the court would adopt, so long as what they do is in keeping with their duty'¹⁶⁷ under section 33.

Under section 38§4, arbitrators may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings. These powers were previously only open to the High Court under section 12§6 of the 1950 Arbitration Act and will be exercisable only if arbitrators are not given such powers. Under section 38§4, arbitrators may give directions in relation to the property which is the subject of the proceedings or as to which any question arises in the proceedings and which is owned by or is in the possession of a party to the proceedings. The directions can be '(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party or (b) ordering that samples be taken from or any observation be made of, or experiment conducted on the property'. The powers are now wider than in the prior law, because arbitrators can extend their orders towards any property which is the subject of the proceedings or as to which any question arises in the proceedings. There is a restriction. Arbitrators have no power in relation to property over a non-party, and so the assistance of the court will be needed in that respect.

Finally, section 38§6 says that arbitrators may give directions to a party for the preservation for the purposes of the proceedings of any evidence in its custody. This is an important new power, which was previously under the ambit of the High Court under section 12§6 of the 1950 Arbitration Act¹⁶⁸. The power has the obvious advantage that when there is any danger of evidence being destroyed its preservation will be ensured.

In France

Generally speaking French law accepts the taking of conservatory or interim measures in the course of the arbitral procedure by interim awards or by orders

¹⁶⁶It is not discriminatory towards foreigners. The section complies with the European Union Regulations which forbid discrimination against foreign parties.

¹⁶⁷DAC 1996 Report § 192 and 194 p44

¹⁶⁸The High Court can still act under section 44§2 of the 1996 Arbitration Act only if arbitrators are not empowered to do so.

emanating from arbitrators. But it also provides examples of non-exclusive powers for arbitrators which concur with those of state courts¹⁶⁹. In practice, arbitrators limit their orders to measures in relation to expertise¹⁷⁰. They cannot require measures involving a compulsory execution or necessitating the assistance of the forces of public order. One delicate matter will be the conditions and the effects of recognition or enforcement of the measure ordered by arbitrators. Under French law, its enforcement and recognition will be dependent upon the enforcement judge's decision. Therefore, in relation to interim measures a balance between the role of arbitrators and of state courts exists.

In the ICC Rules

Pursuant to article 8§5 of the 1988 Rules, the parties are at liberty to apply to any competent state courts for interim and conservatory measures in exceptional circumstances. But such a possibility does not affect the power of arbitrators to order interim measures of protection. Article 8§5 implies that any request for provisional or conservatory measures should normally be addressed to arbitrators. They have the power to order interim or conservatory measures. Such power is recognised despite the fact that no provision expressly states so in the ICC Rules. It is a view which has been recognised in practice¹⁷¹. The absence of a provision expressly empowering arbitrators to order such measures has nonetheless given rise to a measure of uncertainty as to whether or not they really have such a power¹⁷². Some arbitrators consider that such a power directly arises from article 8§5¹⁷³, while others take the view that they do not enjoy such an implied power¹⁷⁴. Here, the need for a better drafting of article 8§5 appears. In a future version, it would be preferable that the power of arbitrators be clearly specified as well as the extent to which arbitrators have the power to order interim or conservatory relief. In the 1998 Rules, arbitrators have clearly the power to order any interim or conservatory measures it deems

¹⁶⁹The assistance of state courts will be dealt with Title Three of the thesis.

¹⁷⁰Arbitrators can only orders involving expertise, nothing else. G. PLUYETTE French Perspective of the interim measures in CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 1993 p72 at 88 (Hereinafter PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES 1993)

¹⁷¹SCHWARTZ in CONFERENCE 1994 p58

¹⁷²SCHWARTZ in CONFERENCE 1994 p58

¹⁷³Case quoted in the paper of E. SCHWARTZ The practices and experience of the ICA in CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION ICC Publication number 519 edition ICC 1993 p45 at 55 (Hereinafter SCHWARTZ in CONSERVATORY AND PROVISIONAL MEASURES 1993).

¹⁷⁴ICC case 3896 of 1982 in JDI 1983 p914 and ICC case 4998 of 1985 in JDI 1986 p1139 and ICC case 4126 in JDI 1984 p934.

appropriate¹⁷⁵. Their granting will be subject to the appropriate security being furnished by the requesting party. The 1998 Rules answer to the difficulties, earlier shown, and often met in practice, whereby the arbitrators' power and the scope of their power were unclear. The 1998 Rules will grant arbitrators a useful power.

In Scotland

The Model Law (article 17) suggests that arbitrators have an inherent power to order interim measures of protection. But it nonetheless imposes a limitation on their power since the request must originate from the parties. The UNCITRAL Arbitration Rules also give arbitrators the authority to order interim measures of protection at the request of a party. The nature of the measures appears to be for the conservation of the goods forming the subject matter in dispute such as ordering their deposit with a third person or the sale of perishable goods¹⁷⁶. In the Iran-US Claims Tribunal, arbitrators dealt with requests for interim protection concerning the deterioration of goods¹⁷⁷, concerning halting the sale of goods by a party¹⁷⁸ and finally seeking an order to stay parallel judicial proceedings in national courts¹⁷⁹.

In Scotland, arbiters have no implied power under the submission to make any interim measures. If the submitters wish arbiters to have this power it must be expressly specified¹⁸⁰. The only means of obtaining such measures is to raise an action in Scottish courts which are entitled to order such measures.

Conclusion

There are several kinds of situations. Either arbitrators are granted a total power to issue interim measures, or partial power concurring to the state courts' power to issue these measures, or finally no power at all.

In new arbitration acts such as the 1996 Arbitration Act or the 1998 ICC Rules arbitrators are now granted powers which were previously exercisable by national courts. Wherever a power can be exercised by arbitrators rather than national courts,

¹⁷⁵Article 23 of the 1998 Rules

¹⁷⁶S. ABERCROMBIE BAKER & M. DAVID DAVIS *THE UNCITRAL ARBITRATION RULES IN PRACTICE : THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 1992 p133 (Hereinafter ABERCROMBIE BAKER & DAVIS 1992)

¹⁷⁷ABERCROMBIE BAKER & DAVIS 1992 p134

¹⁷⁸ABERCROMBIE BAKER & DAVIS 1992 p135

¹⁷⁹'The tribunal had particular strong authority to override the jurisdiction of municipal courts because of the peculiar legal structure that created the Tribunal... The Tribunal was to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of such all claims through binding arbitration.' ABERCROMBIE BAKER & DAVIS 1992 p136

¹⁸⁰HUNTER 1987 p272

provisions have been made to that effect thereby reducing the need to incur further delays and expenses for making an application to a national court during arbitral proceedings¹⁸¹. This reasoning is totally in accordance with the current philosophy in the arbitration community to render arbitration as independent as possible from the unnecessary intervention of national courts.

Part 10 : The power in case of party's default according to the texts under study

When a party refuses to take part in arbitral proceedings, or when a party refuses to comply with the arbitrators' orders to submit documents, or when a party fails to participate in the arbitration without inexcusable delay, arbitrators may face a difficult situation.

The 1996 Arbitration Act grants certain powers to arbitrators in cases where a party failing to proceed with the arbitration. Section 41 covers the situation of delay by the claimant, failure by either party to attend arbitral proceedings or to make submissions and failure to comply with the arbitrators' orders. If there is an inordinate and inexcusable delay from the claimant in pursuing his claim, arbitrators may make an award dismissing the claim¹⁸². If, without showing sufficient cause, a party fails to attend or be represented at a hearing or fails to submit written evidence, arbitrators may hold the proceedings in its absence and make an award on the basis of the evidence available¹⁸³.

In France, there is no mention of such a power in the 1980 decree. According to the principles of litigation¹⁸⁴, the parties are required to co-operate with respect to matters of proof, and the judge may draw the full consequences from their failure or refusal¹⁸⁵. The provision also applies to arbitration in the light of article 1460. Accordingly, arbitrators may draw the full consequences of the parties' failure to submit a piece of evidence, a document requested by them, and also if they fail to attend the hearing after having being duly summoned. It is implied that arbitrators may proceed with the arbitration.

Under the ICC Rules, if one of the parties, although duly summoned, fails to appear, arbitrators, if satisfied that the summons was duly received and the party is

¹⁸¹ DAC 1996 Report p44

¹⁸² Under section 41 §3 of the 1996 Arbitration Act

¹⁸³ Under section 41 §4 of the 1996 Arbitration Act

¹⁸⁴ These principles are laid down in the first articles of the NCPC. Refer to Appendix 4.

¹⁸⁵ Article 11. INCPC

absent without valid excuse, have the power to proceed with arbitration. And such proceedings are deemed to have been conducted in the presence of all parties¹⁸⁶. At any stage, when a party refuses to participate in the arbitration either at the outset or later on arbitrators are entitled to proceed with the arbitration without the recalcitrant party as long as it was duly summoned.

The Model Law also provides a similar provision. Article 25 covers cases of failure by the claimant to communicate the statement of claim, failure by the respondent to communicate his statement of defence, and failure by a party to appear at a hearing or to produce documentary evidence. Arbitrators may continue with the proceedings without treating such failure in itself as an admission of the claimant's allegations. They may continue with the proceedings and make their award on the evidence before them.

Conclusion

Such a power is a useful weapon left to the discretion to arbitrators. The good functioning and development of arbitration should not be precluded by the parties' behaviour. If the parties are aware that arbitrators have such a weapon, and the capacity to continue with the proceedings in their absence, and render an award without considering their evidence, it will be an incentive to comply with their orders.

Part 11 : The power of the presiding arbitrator or oversman or umpire

It is quite usual to have a 3-man-tribunal composed of two party-appointed arbitrators and a chairman, either chosen by the parties or by the 2 party-appointed arbitrators if possible or by an appointing authority. At the time of the award, arbitrators and the chairman will aim at reaching a consensus on the award to produce an award agreed with by every arbitrator. But, sometimes, a compromise will not be possible and a situation of deadlock occurs.

In England

Section 20 and 21 of the 1996 Arbitration Act set forth principles that the DAC believed to be the position under English law in the absence of a specific agreement by the parties concerning the functions and power of chairmen and umpires. Section 20 defines the function of the chairman¹⁸⁷, whereas section 21 defines the functions of

¹⁸⁶ Article 15 of the 1988 Rules and articles 5, 6§3, 8§3, 18§3, 19§3 and 21§2 of the 1998 Rules

¹⁸⁷ Which is a new concept in English law; see MERKIN R. chapter 21 p37

an umpire¹⁸⁸. For both, the parties are free to agree what their functions should be. Section 20 derives from the Model Law and the 1950 Arbitration Act¹⁸⁹, while section 21 derives from the 1950 Arbitration Act¹⁹⁰. In default of an agreement between the parties, decisions, orders and awards are to be made unanimously, but if this proves to be impossible, the chairman's view will prevail even if there neither unanimity nor a majority among arbitrators¹⁹¹. Section 20§3 confirms the idea that arbitrators must act by a majority in all matters. However if no majority can be reached section 20§4 allows the chairman to determine the matter (i.e. make the decision if one co-arbitrator has refused to reach a conclusion on an issue or if the arbitral tribunal is unable to reach a conclusion). In default of agreement between the parties as to an umpire's function, he should attend the proceedings¹⁹², if decisions, orders and awards cannot be made by the other arbitrators, he replaces them, with the power to make decisions, orders and awards as if he were sole arbitrator¹⁹³. To do so, the umpire will observe the arbitral proceedings¹⁹⁴. The parties may even suggest that he deliberates with the arbitrators prior to the disagreement¹⁹⁵. The umpire is nonetheless not entitled to attend nor take part simply because he has not yet the jurisdiction to determine the dispute as that is still a matter for the arbitrators.

In France

The parties may grant the chairman of their arbitral tribunal specific powers which he will exercise on his own or after consultation with the other members of the tribunal. These powers may include : the possibility of allowing a longer time-limit to a party in a situation of acceptable delay and of fixing a new time or date of hearings or of ruling upon incidents during hearings and so on.

Finally, the chairman may impose his view in the event of difficulties in elaborating the final award. If there is no majority, the chairman may impose his

¹⁸⁸The umpire is an English concept. When each party appoints a party-appointed arbitrator the umpire intervenes when they cannot reach a consensus. The DAC seriously considered the abolition of umpired tribunals and its replacement with chaired tribunals. But in the end, the DAC recommended against its abolition. DAC 1996 Report § 94 p25

¹⁸⁹Article 29 of the Model Law and section 9 of the 1950 Arbitration Act

¹⁹⁰Section 8§2 and 8.3 of the 1950 Arbitration Act

¹⁹¹Under section 20§4 of the 1996 Arbitration Act

¹⁹²Under section 21§3 of the 1996 Arbitration Act

¹⁹³Under section 21§4 of the 1996 Arbitration Act

¹⁹⁴It has been held that the umpire's attendance be implied, even for potential umpire, so they could assume their role whenever it is needed. see *Fletamentos Maritimos v Effjohn* [1995] 1 Lloyd's Rep. 311 at 314 per Mr Justice Tuckey.

¹⁹⁵'In the absence of an agreement between the parties an umpire can neither take part nor attend an arbitration until the arbitrators have disagreed'. DAC 1996 Report p25

decision upon other arbitrators. It is worth noticing that, in such a situation, the final award will have the same effect as a normal award.

In the ICC Rules

In ICC arbitration where three arbitrators cannot reach a majority, the award is made by the chairman of the arbitral tribunal alone. Thus, pursuant to article 19 of the 1988 Rules, the chairman is given authority to make the award which will have the same quality as any unanimous award. Before recourse to the chairman's decision, arbitrators must endeavour to reach a unanimous award. In the 1998 Rules, the chairman has the same power to make the award if there is no majority¹⁹⁶.

In Scotland

In the absence of contrary agreement, arbiters have an inherent power to nominate an oversman should a deadlock arise as to the final award¹⁹⁷. His nomination can either be made by the parties themselves in the deed of submission or be made by arbiters¹⁹⁸. He is then in charge of deciding the matters which have been devolved to him. Nothing more, nothing less. If the whole submission has been devolved to him, he should deal with and exhaust the questions put forward and produce an arbitral decree¹⁹⁹. It has been argued that since the Model law does not provide, in the absence of a solution agreed by the parties, for the resolution of a deadlock between arbitrators, the situation chosen by Scots law could be used elsewhere under the Model Law²⁰⁰.

The Model Law also grants the presiding arbitrator specific powers unless otherwise agreed by the parties and / or by the majority of the members of the tribunal. If they all agree, whether the parties or the full tribunal, there is a delegation of the decision to the presiding arbitrator. The majority of the drafters refuse to specify in the text that the presiding arbitrator could decide in case of deadlock. The Model Law only insists on the majority rule towards the reaching of an award and leaves the parties free to contract otherwise and entrust the presiding arbitrator to

¹⁹⁶Article 25 of the 1998 Rules

¹⁹⁷Otherwise the submission would be 'exposed to the hazard of becoming abortive for want of an award'. BELL 1877 p186

¹⁹⁸See section 4 of the 1894 Act. The devolution of the matter to the oversman is done by a minute of devolution (written and signed) explaining that the arbiters differ in opinion in consequence of which it has become necessary for them to execute a devolution and then proceeding to the devolution itself. While devolving the matter in dispute great care must be taken if the arbiters are only willing to devolve part of the submission. They are consequently *functus officio*. The oversman, after acceptance by a short minute, will have similar power to those of the arbiters.

¹⁹⁹IRONS & MELVILLE 1903 p176 and 177

²⁰⁰DAVIDSON 1992 p153

decide. Besides the matter relating to the award itself, the presiding arbitrator is empowered to decide procedural questions after the parties' acceptance as well as the acceptance from the members of the arbitral tribunal.

Conclusion

The power granted to the chairman or oversman or umpire to decide the award alone could be subject to criticism as arbitrators might abuse such a power. In an institutional arbitration, any attempt by the chairman to abuse his position should be prevented and corrected by the supervising body like the ICA when the draft award is being scrutinised. Then, any abuse is unlikely to be accepted and encouraged. Recourse to the chairman's decision when the arbitral tribunal is unable to reach a majority decision is a good solution to avoid a deadlock. However, recourse to the chairman's decision for the award is not very common in practice as arbitrators will endeavour to reach a compromise and produce a majority award if possible.

To sum up, the power of the chairman is certainly not limited to the rendering of an award. Even if the chairman's powers are rarely stated in detail in the legislation or rules²⁰¹, they do exist and relate to a wide spectrum of matters such as the organisation of the procedure, the fixing of deadlines, presiding over the hearing, the conduct of the debate to reach a decision. About issues of procedure, the chairman is usually expected to propose a solution to the difficulties met. At the end the powers of the chairman depend upon the parties' will to increase them or reduce them. If the chairman is given wide powers he may be able to accelerate the development of the arbitration. In reality, he does not have that much power to impose a rapid development of the arbitral proceedings since this greatly depends upon the parties' will to take the right steps when necessary.

The granting of powers to a chairman is a solution to overcome deadlock in the course of the arbitration proceedings but they should not be abused, otherwise the award may be challenged and set aside.

Contemplating the presence of a chairman, oversman or umpire at an earlier stage should ensure the parties that no unnecessary delays will happen. In considering their powers, the parties may set up a time to which the arbitrators can fail to agree, but once they have reached the deadline, they should ask the umpire or oversman to intervene in the decision-making of the award.

²⁰¹There are numerous articles dealing with the power of the chairman or of party-appointed arbitrators. Please refer to Appendix 6 : bibliography.

Part 12 : The power to decide a claim relating to verification of a writing or falsification of a document

Under French law, arbitrators have the power to decide a claim of verification of a writing and a claim of falsification of a document according to article 1467 NCPC. Arbitrators can deal with these claims if they are main claims. Arbitrators may also deal with these types of claims as connecting claims unless a contrary agreement from the parties. There would be no real interest to undertake an arbitration to decide a claim of verification of a writing and of falsification of a document. Arbitrators may deal with such a claim when it arises in the course of the arbitration. They may avoid dealing with this sort of claim if they wish, but they have a recognised power to deal with it. The procedure to follow is set out in articles 287 to 294 NCPC. They deal with the allegation that a writing is not an act executed by the person to whom it is attributed.

Such a power is rather original. Only the French decree mentions it. Such a power can be a useful tool. If such a claim of verification of a writing and of falsification of a document arises in the course of the arbitration, arbitrators will be able to consider it, which would be an asset that should avoid a further recourse to national courts. Similar power would be regarded as available for English and Scottish arbitrators only if the parties have agreed to it. But such a power is not contemplated within the ICC Rules or in the Model Law.

Part 13 : The power to issue an interim or partial award according to the texts under study.

The power of arbitrators to issue interim or partial awards usually derives from the arbitration agreement, from the applicable law or from institutional rules. This power is usually conferred on arbitrators unless an express provision by the parties states the contrary.

Partial awards or interim awards usually deal with questions such as the arbitrators' jurisdiction, substantive law, interim measures of protection. Interim or partial awards are a useful 'weapon in the armoury'²⁰² as arbitrators may tackle

²⁰² REDFERN & HUNTER 1991 p375

significant matters during the course of the arbitral proceedings which, once solved, may save time and avoid the delay in issuing a final award.

English arbitrators have now discretionary power to make provisional awards for the payment of money or the disposition of property as between the parties under section 39 of the 1996 Arbitration Act. But provisional awards will not cover Mareva injunctions or Anton Piller relief as the practitioners expresses their disagreement²⁰³. Arbitrators also have power to make an interim payment on account of the costs of the arbitration, unless contrary provision is made by the parties. Such a power is limited to the agreement of the parties. The Act does not give any indication as to how arbitrators should exercise their discretion. It would seem then that a certain flexibility should be allowed. In ordering provisional awards, they should keep in mind their duties to avoid any discrimination between the parties. Under section 47, arbitrators may make awards on different issues, often referred as interim awards, but they should be distinguished from provisional awards. The latter type of awards are made prior to the conclusion of arbitral proceedings, but they are nonetheless final as to the matters which they determine. Again such a tool must be agreed by the parties. The arbitrators' discretion is not explained either in the 1996 Arbitration Act or in the DAC 1996 Report. However the drafters of the DAC 1996 Report hope that arbitrators will adopt this approach in any case where it appears that time and money will be saved by doing so and where such an approach would not be at the expense of any other requirement of justice²⁰⁴.

In French law there is no mention of such a power. One may conclude that arbitrators are supposed to have such a power unless stated otherwise by the parties in their arbitration agreement.

ICC arbitrators have the power to issue partial awards prior to the final award. Pursuant to article 21 of the 1988 Rules, the award will be subject to the scrutiny of the ICA for its adoption. In the 1998 Rules, article 2 provides a number of definitions : among those 'an award may include interim, partial or final award'. Accordingly arbitrators may render interim or partial awards. At the meeting of the ICC Commission of International Arbitration some expressed their unhappiness about the inclusion of these definitions which are not complete and did not include the

²⁰³ These powers are therefore left to English Courts. See DAC 1996 Report p45-46 and MERKIN R. chapter 21 p67

²⁰⁴ DAC 1996 Report § 230 p51

interpretative award, for instance²⁰⁵. At this meeting, it was discussed whether or not this article 2 should be kept in state. In the end, article 2 was kept.

Despite the fact that interim or partial awards are not mentioned in the Model Law, arbitrators may have the power to issue them. The drafters²⁰⁶ had in mind these types of award when drafting article 32§1. The Working Group believed that arbitrators had the power to render interim, interlocutory and partial awards²⁰⁷. As these types of awards are not expressly mentioned, one cannot say with absolute certainty that an arbitrator has such a power but he should have such a power since it is not expressly said that he does not possess it. For certainty, the parties should specify in their agreement that arbitrators have such a power.

The Iran-US Claims Tribunal was entitled to make interim, interlocutory or partial awards²⁰⁸. Partial awards were used to resolve a single claim, or a few claims in a case while other claims needed further investigation. They were also used to separate the merits of the case from the issue of interest and costs²⁰⁹. Interlocutory awards were used to determine the Tribunal's jurisdiction over a case, to appoint experts, to decide evidentiary matters, to permit amendments of claims and to decide how the case should proceed²¹⁰. Interim awards were used to order the interim measures requested by the parties²¹¹.

In Scots law, both categories of interim and part (in the Scottish terminology) awards are recognised as being provisional (because the matter is temporary tackled), not conclusive²¹². The arbiter has the power to pronounce both kind of awards but this power should be expressly mentioned in the submission since there is doubt as to whether it is an implied power²¹³.

²⁰⁵Meeting taking place at the ICC headquarters on the 27th February 1997. Mssr Reiner, Lazareff, and Aurillac expressed their concern that the proposed definitions were not complete, and they should be removed since it was not an exhaustive list.

²⁰⁶Although none [of the interim or partial awards] was included in the final text of the Model Law, these proposed definitions provide an indication of what the drafters had in mind by the term of final award which does appear in the final text.' HOLTZMANN & NEUHAUS 1989 p867

²⁰⁷Fourth Working Group Report A/CN.9/245§118 in HOLTZMANN & NEUHAUS 1989 p880

²⁰⁸Under article 32 of the UNCITRAL Arbitration Rules

²⁰⁹ABERCROMBIE BAKER & DAVIS 1992 p164

²¹⁰ABERCROMBIE BAKER & DAVIS 1992 p165

²¹¹ABERCROMBIE BAKER & DAVIS 1992 p164

²¹²HUNTER 1987 p306

²¹³IRONS & MELVILLE 1903 p185 and see *Lyle v Falconer* (1842) 5D 236-240

Conclusion

Arbitrators are usually granted the power to issue interim, interlocutory or partial awards in the course of arbitral proceedings unless contrary provision is made by the parties. Neither France and the Model Law expressly grant them such a power. The drafters of the Model Law had it in mind, but it was not included in the final version of the text. At the time of the drafting of the French decree, such a power did not appear to be necessary. The French text leaves the parties at liberty to vest arbitrators with such a power.

Part 14 : The power to award costs

The costs of an arbitration usually includes the arbitrators' fees (their travel expenses with hotel, and restaurant bills, and their remuneration), the costs of the arbitration, the secretarial work, the copying expenses, translation fees, the rental of the venue (the conference room for the hearing or meeting), the cost for experts and witnesses (their travel expenses, and the fees for experts' advice) and the costs of counsel's preparation work.

In English law

The 1996 Arbitration Act follows the trend²¹⁴ but includes some changes because the 1950 Arbitration Act confers the power to exercise their discretion to award costs, the power to settle the amount of the costs and the power to award the costs with an entire discretion²¹⁵. Arbitrators should award costs unless the parties agree otherwise. Section 61 gives statutory guidance on how arbitrators should allocate costs. The provision contains the important limitation that costs must follow the success. There is a long standing practice that the loser has to pay the costs of the winner. It is subject to modification where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs. It allows arbitrators to disregard the above principle if they deem that the circumstances justify another decision, for instance, if a party was guilty of unreasonable conduct during the proceedings²¹⁶. This provision has been heavily criticised before the Parliament by Lord Hacking on 2nd reading ; he felt that arbitrators should allocate costs proportionally according to the perceived merits rather than on an all-or-nothing

²¹⁴ Section 61 of the 1996 Arbitration Act.

²¹⁵ Section 18 of the 1950 Arbitration Act. Its wording could be misleading because arbitrators did not have an entire carte blanche.

²¹⁶ For more details upon the matter justifying a departure from the general rules of the costs see MUSTILL & BOYD 1989 p396-397

basis²¹⁷. However this view was not followed. But the DAC responded to this argument in specifying that the parties are free to agree on a principle²¹⁸.

In French law

Arbitrators have the power to award costs in the arbitral award. It is common practice for the award to contain a clause as to the payment of the arbitration costs and arbitrators' fees and the parties' shares²¹⁹.

It is usual for the costs²²⁰ to be assessed against the losing party unless judges assess the whole or the part of the burden against the other party in a reasoned decision. In conformity with article 696 NCPC, arbitrators have the ability to assess the costs usually against the losing party. By an award containing the reasons, arbitrators may impose liability upon the winning party to pay part or the whole amount of the costs. As to the arbitrators' fees, their payment is generally shared between both parties.

If there is a clause dealing with it in the arbitration agreement, arbitrators are usually entitled to fix it in the award as well as the proportions under which the costs shall be borne.

In the ICC Rules

When the case is set in motion by the ICA, the advance on costs²²¹ for the arbitration will be fixed²²². It is based upon the ICA's estimate, at the time, of the fees and expenses of the arbitrators and the administrative expenses of the ICC in accordance with the scale contained in appendix III of the ICC 1988 Rules in accordance with the amount in dispute either principal or counterclaims if any²²³. Arbitrators do not have power to fix the advance on costs. The parties are asked to pay the advance on costs subject to later readjustments²²⁴. However, pursuant to article 20

²¹⁷ MERKIN R. chapter 21 p 58

²¹⁸ DAC 1996 Report p56

²¹⁹ ROBERT & MOREAU 1993 p181

²²⁰ Article 695 NCPC

²²¹ A rough estimate of the likely expenses of the arbitral tribunal will be made taking into account amount other things, the place of arbitration, the arbitrators' likely travels costs if any and the possible hearing time that may be required. The amount of the advance is provisional and always subject to readjustment as the arbitrator's fees and the administrative expenses are not fixed until the completion of the arbitration proceedings, nor will the arbitrator's expenses be finally known until that time.' SCHWARTZ The costs of ICC Arbitration in ICA Bulletin 1993. 8 at 18

²²² Article 30 of the 1998 Rules. See Appendix III of the 1988 Rules and 1998 Rules.

²²³ These calculations are done pursuant to the scale contained in Appendix III of the ICC Rules

²²⁴ The parties may augment or reduce the amount of their claims, they may quantify them if not done earlier, or withdraw their claims, or when the expenses of arbitrators or administrative expenses are going above or under the estimate done at the time of the setting in motion of the case.

of the 1988 Rules and article 31 of the 1998 Rules, their award must fix the costs of arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties. Whatever their decision as to costs, the final decision must be approved by the ICA as the award is under its scrutiny.

In practice, arbitrators usually submit their draft award to the ICA with the amount of the costs of arbitration left blank²²⁵. The counsel in charge of the case²²⁶ calculates the administrative expenses and the arbitrators' fees and expenses. He submits them to the ICA for approval when the draft award is being approved.

In Scotland

The UNCITRAL Arbitration Rules grant arbitrators the power to award costs²²⁷ which are usually borne by the unsuccessful party. But the Model Law does not address the matter of costs, simply because the Working Group took the view that this matter should not be dealt with²²⁸. It is left then to the care of domestic law. The Iran-US Claims Tribunal did not have the power to award costs as anticipated in article 38 of the UNCITRAL Arbitration Rules in order to conform to the Tribunal's semi permanent and governmental character²²⁹. The arbitrators' fees and expenses were excluded from the definition of the costs of arbitration²³⁰. The costs were borne in equal shares by both Governments.

Under Scots law, usually, there is a clause in the submission stating that the arbiter has power to award the costs or expenses incurred during the arbitration. But in *Ferrier v Alison*²³¹ it was decided that the arbiter was entitled to award expenses, though no mention was made of them in the submission and that whether the submission was special or general.

Part 15 : The power to award interest according to the texts under study

The payment of interest is a common means of repairing loss suffered by a party in contractual relationships. The question whether interest should be paid depends upon the original contract between the parties, upon the law governing the underlying contract, and the law governing the arbitration. The resolution of the question is also

²²⁵ CRAIG & PARK & PAULSSON 1990 p336

²²⁶ A staff member of the Secretariat

²²⁷ Under article 38 of the UNCITRAL Arbitration Rules.

²²⁸ See A/CN. 9/216§99 in HOLTZMANN & NEUHAUS 1989 p1119

²²⁹ ABERCROMBIE BAKER & DAVIS 1992 p210

²³⁰ ABERCROMBIE BAKER & DAVIS 1992 p210

²³¹ *Ferrier v Alison* (1843) 5D 456

determined by the arbitration agreement whether or not the parties have vested arbitrators with the power to award interests. Two types of interests are available : simple interest or compound interest.

In England

The 1996 Arbitration Act preserves the prior power²³², with some significant changes like awarding compound interest²³³ on a compensatory basis and not punitive basis²³⁴. Section 49 brings complementary information as to the arbitrators' capacity to award interest as the 1950 Arbitration Act was no very complete. The parties still have the power to agree on the arbitrators' powers otherwise they have the above power : award compound or simple interest. Arbitrators can choose the rate, the rests on the whole or part of the outstanding amount from any date prior to the award. The terminal date must not be later than the date of the award itself, whereas the starting date will be decided by the arbitrators. The rate should be based on normal commercial considerations and standards²³⁵ and specified by the arbitrators in their award. The duration of the payment of interest is left to the arbitrators' discretion. They can choose to specify the period during which interest should not be paid. And arbitrators can award interest on the outstanding amount of any award²³⁶ until it is paid, the principal amount to include costs and interest in the award. Section 49§5 allows arbitrators to award interest to be paid on an amount payable under a declaratory award²³⁷. Under the section, the power to award interest on any sum of money relates to either partial or final award. The granting of interest can be done whether claimed or not. And if interest is not awarded, arbitrators should state the reason for their omission.

In Scotland

It seems that arbiters have an implied power to deal with the question of interest as it is a procedural issue²³⁸.

²³²Section 15§6 of the Administration of Justice Act 1982 and section 19§a of the 1950 Arbitration Act

²³³Such power is remarkable because the courts do yet not have the power to award compound interest. A similar power should be soon extended to the courts.

²³⁴DAC 1996 Report p51

²³⁵As those adopted by banks when lending money as it is usually the case.

²³⁶Under section 49§4 of the 1996 Arbitration Act

²³⁷Of section 48§3 of the 1996 Arbitration Act. This applies for situation like : if a declaration says that a sum of money is due from one party to another, if a declaration says that a contract is not binding because of some defects, and a reimbursement of money was not received, then the interest will be payable on that sum.

²³⁸IRONS & MELVILLE 1903 p219

The *Grampian Regional Council v John Mac Gregor (Constructors) Ltd*²³⁹ brings a new turn because the power to award interest was not confirmed by the court. This case establishes the contrary to what was previously said. In that case, the deed of submission did not expressly give the arbiter the power to award interest, but he awarded the main contractors interest on the principal sums found due to them from the date on which claims were lodged in the arbitration. Grampian Regional Council appealed on the question whether the deed gave him the power to award interest. The court decided that as the deed did not expressly confer upon him power to award interest on sums which he found to be due by the employer to the contractor prior to the date of his final decree, there is no legal power in the arbitrator to order interests²⁴⁰. The court also added that an arbiter does not have an implied power to award interest on principal sums prior to the date of the final decree while the court recognised that he has a power to award interest from the date of the final award²⁴¹. This decision is quite extraordinary. The present writer believes that this change is a regression rather than a step forward. This decision will lead to unsatisfactory and completely ridiculous results. Why should arbitrators be allowed to award interest from the date of the final award while they cannot award interest on principal sums prior to the date of the final decree? This approach lacks logic and is rather detrimental to arbitration as a whole. This decision brings the present writer to wonder whether or not Scottish judges are trying to sabotage the arbitration business in Scotland.

Conclusion

There is no mention of this matter in the ICC Rules or in French decrees or in the Model Law because it was considered to be a matter of the substantive law or a matter to be dealt with by the ICA. It can be concluded that there is no international consensus as to whether or not arbitrators may award interest. Some legal systems (England) grant arbitrators with the power to award interest while others like Scotland do not give the power to awards interest to arbitrators. Some texts do not address this question. Considering the silence of these texts, one may conclude that the parties must specify whether or not arbitrators would be allowed to award interest. If arbitrators have the power, the amount of interest is at their discretion but it should be reasonable and provide the party with adequate compensation for being kept out of his money.

²³⁹ *John Mac Gregor (Constructors) Ltd v Grampian Regional Council* 1991 SLT 136

²⁴⁰ *John Mac Gregor (Constructors) Ltd v Grampian Regional Council* 1991 SLT 136 at 137

²⁴¹ *John Mac Gregor (Constructors) Ltd v Grampian Regional Council* 1991 SLT 136 at 137

Part 16 : The power to submit a dissenting opinion in the award

A dissenting opinion is a statement in which arbitrators explain the reasons for their disagreement as to the content of the award. The dissenting arbitrator does not share the others' view as to the result of their deliberation.

In England

The 1996 Arbitration Act does not mention dissenting opinions. Nothing is said as to whether dissenting opinions can be included in the award. The parties can always agree that the dissenting arbitrators include their opinions in the award or communicate them to the parties.

In France

The NCPC does not mention dissenting opinions. As no article really prevents it, one could interpret such a silence as an acceptance of these dissenting opinions, even if French practitioners believe and understand that an arbitrator may disagree with the award. Dissenting opinions are not accepted because by introducing his dissenting opinion in the award, the dissenting arbitrator may violate the principle of secrecy²⁴² of the deliberations²⁴³, which is a sacrosanct principle. Not only can he not do that but he cannot publish his disagreement nor can he inform anyone about his disagreement. He may consequently refuse to sign the award.

In the ICC Rules

Dissenting opinions are not mentioned as it was agreed by the ICC Working Party that it was not desirable to introduce a new article rules on dissenting opinion into the rules²⁴⁴. In practice²⁴⁵, they are usually not transmitted to the parties by the

²⁴²Principle established by article 1469 NCPC and 448 NCPC.

²⁴³See BREDIN in *LES ETUDES OFFERTES A J. BELLET* 1991 p76 and De BOISSESON 1990 p802

²⁴⁴Final report of the Working Party on dissenting and separate opinions in ICA Bulletin 1991. 32 (Hereinafter Final report on dissenting opinions in ICA Bulletin 1991)

²⁴⁵During my internship, there was a case in which a member of the arbitral tribunal went to an external lawyer to prepare his dissenting opinion. During the plenary session of the ICA, opposite views were expressed. On the one hand some were strongly against the communication of this particular dissenting opinion to the parties because it is against the practice of the ICA to do so because it would most likely affect the future validity of awards. On the other hand, others supported the view that the communication of dissenting opinions should be done, because the ICA cannot afford that the parties have the feeling that it has something to hide. It was further added that the ICA should deal with dissenting opinions on a case by case basis. At this plenary session, it was said that the communication of dissenting opinions should be reconsidered in the future.

Secretariat despite contrary recommendations by the Working Party²⁴⁶. They are not approved but the ICA will nonetheless examine them if they are submitted, in time, with the draft award. The dissenting arbitrator may express his disagreement in a dissenting or separate opinion which will be kept in the file. The ICA ultimately considers these dissenting opinions in case they underline a forgotten point in the award. If so the ICA will draw the attention of the majority of arbitrators to any points raised in the opinion which may indicate a weakness in the reasoning in the award. It is permitted only if in the law governing the arbitration dissenting opinions are accepted. The 1998 Rules still ignore the issue of dissenting opinions because of opposite views either strongly against their inclusion in the rules or highly in favour of their inclusion in the rules. As the ICC Commission of International Arbitration was pressed by time it agreed to avoid the issue. In the future the issue will need to be addressed and finally settled.

In Scotland

Dissenting opinions are unknown in Scottish practice. In a situation where two arbiters have been unable to reach an agreement, they devolve their power to an oversman, who will then be in charge of issuing the final award. As to the Model Law, dissenting opinions are not addressed in the final text, because the Working Group was unable to reach a compromise between the view whereby dissenting opinions should be integrated within the award and the contrary view²⁴⁷. In the end, the drafters chose to avoid any specific mention of dissenting opinions. The Secretariat later concluded that this matter would be governed by article 19, which regulates the conduct of the arbitral proceedings. Therefore the introduction of the dissenting opinion is left to the discretion of arbitrators.

In adopting the UNCITRAL Arbitration Rules, the Iran-US Claims Tribunal took the view that the dissenting opinions were acceptable because this would have a positive impact and would upgrade the quality of both deliberations and majority opinions²⁴⁸. In any event, the parties are free to address the matter in the arbitration agreement and to accept the presence of a dissenting opinion in the award or not. As Fraser Davidson has observed, the dissenting arbitrator may always send his opinion to the parties on an informal basis²⁴⁹. But this is not advisable.

²⁴⁶ The Working Parties proposed that dissenting opinions should be transmitted to the parties. Final report of the Working Party on dissenting opinions in ICA Bulletin 1991. 32

²⁴⁷ See A/CN. 9/263 article 31 §2 p854 and A/CN. 9/263 article 31 §1 p854 in HOLTZMANN & NEUHAUS 1989

²⁴⁸ ABERCROMBIE BAKER & DAVIS 1992 p167

²⁴⁹ DAVIDSON 1992 p163.

Conclusion

Dissenting opinions are a delicate matter to deal with. If the legal system authorises arbitrators to give dissenting opinions then they can do so but with a certain circumspection. If the legal system prohibits arbitrators from giving dissenting opinions, then the parties may be able to opt out and vest arbitrators with such a power. Care must be taken as the recognition and the enforcement of the award could be put into question.

The issue of dissenting opinions also underlines the duty of the chairman. His power would be undermined if he cannot convince a recalcitrant arbitrator to restrain from writing a dissenting opinion.

In adapting the UNCITRAL Rules of Arbitration for its own use²⁵⁰, the Iran-US Claims Tribunal chose to record dissenting opinions. It has been alleged that the presence of dissenting and concurring opinions had a strong influence on the Tribunal and that it has upgraded the quality of both the deliberations and the majority opinions²⁵¹. Knowing that arbitrators may dissent and may communicate their dissenting opinion to the parties certainly forces them to reach a compromise solution, to avoid the presence of any dissenting opinion. Such opinions can put pressure on arbitrators to be sure that the argumentation of the award is thorough and persuasive enough.

In communicating their dissenting opinions to the parties, arbitrators may violate the secrecy of their deliberation, which can be contrary to the principles of the national law governing the proceedings. Allowing dissenting opinions to be included in the award would allow its abuse. As seen in the Iran-US Claims Tribunal, some members pushed the privilege to its limit²⁵². Such a right meant that they could comment on the evidence and legal reasoning at issue in the proceedings, which later gave ground for the parties to challenge the award²⁵³. This is the rationale behind most rules and legal system which prevent the communication of dissenting opinions to the parties.

²⁵⁰Article 32 of the UNCITRAL Arbitration Rules does not allow the inclusion of dissenting opinions in the award.

²⁵¹ABERCROMBIE BAKER & DAVIS 1992 p 1

²⁵²This practice has confirmed the fears of those UNCITRAL drafters who opposed permitting dissenting opinions, in the sense that it has allowed US and Iranian arbitrators to play the folks back home'. ABERCROMBIE BAKER & DAVIS 1992 p168

²⁵³*Dallal v Iran* 3 IRAN-US.CTR 1983. 10 at 16-17 on the basis of Judge Holtzmann dissenting opinion

Part 17 : The power to correct and interpret an award

Even if arbitrators are usually deemed to be *functus officio* once they have submitted their final award, an exception to the principle is nonetheless recognised. Arbitrators are usually given the power to correct some kinds of specific errors and interpret their award. The principle is based upon the idea that arbitrators are definitely the best persons to do that since they had studied the case and the facts involved. Recourse to courts is possible and is necessary if arbitrators cannot do so or are not given the power to correct or interpret their award.

In England

Section 57 of the 1996 Arbitration Act provides that arbitrators have the power either to correct an award or to make an additional award unless there is a contrary agreement. It is modelled upon the 1950 Arbitration Act (under section 17) and upon the Model Law (article 18§4).

Acting either on their own initiative, or at the request of a party, arbitrators may correct any clerical mistake, any error arising from an accidental slip or omission, error of computation, or typographical error, as well as clarifying the award and removing any ambiguity²⁵⁴.

Finally, they can make an additional award dealing with a claim previously presented to them, that they had omitted in the award²⁵⁵. Any application by a party for the correction of the award must be made within 28 days of the date of the award²⁵⁶.

Arbitrators must complete the requested corrections within 28 days²⁵⁷ from the receipt of the application; by contract an additional award can be made within 56 days from the date of the original award²⁵⁸.

In France

Articles 461 NCPC and 462 NCPC confer upon every judge the power to interpret his decision, and correct material errors or omissions which affect a judgement if it is not appealed. The case law has integrated and adapted the principle to arbitration with article 1475§2 NCPC. Hence arbitrators have such a power. A condition is nonetheless imposed for its implementation which is based on common sense. It is only possible if all arbitrators can gather. If this is not possible then it must

²⁵⁴Under section 57§3§a of the 1996 Arbitration Act

²⁵⁵Under section 57§3§b of the 1996 Arbitration Act

²⁵⁶Under section 57§5 of the 1996 Arbitration Act

²⁵⁷Under section 57§5 of the 1996 Arbitration Act

²⁵⁸Under section 57§6 of the 1996 Arbitration Act

be done by the court which could have jurisdiction to consider the dispute if there had been not arbitration.

In the ICC Rules

Considering that arbitrators submit any award in a draft for approval by the ICA, the situation is quite different. After the scrutiny of any draft award by the ICA, arbitrators may be asked to make corrections, additions or modifications of form. After its adoption arbitrators are able to interpret the award through an interpretative award. Any interpretative award should be nonetheless submitted to the ICA in a draft form to be scrutinised.

Therefore if a correction or interpretation of the award is needed, it will be done at the request of the ICA since the ICA will draw the arbitrators' attention to necessary changes required before the draft award can be accepted by the ICA. The 1998 Rules do not bring any changes to this procedure currently used²⁵⁹.

In Scotland

Pursuant to section 33, arbitrators may correct in their awards any errors in computation, any clerical errors, or typographical errors or any errors of a similar nature and interpret the award at the parties' request within a 30 days period after the receipt of the award. Arbitrators have 30 days to make the correction or give an interpretation of the award if they deem it necessary. They obviously have an complete discretion and cannot be forced to do so without a recourse to national courts.

In domestic arbitration, once the award has been issued arbiters are *functus officio* and consequently they do not have the power to alter or correct their award. The only relief lies with the courts of law which will correct a clerical error.

Conclusion

The possibility to correct a clerical mistake, omission, and typographical errors or interpret an award is a positive and useful power conferred on arbitrators. Arbitrators are the best persons to do it. It is time saving and in the parties' interests. Since arbitrators are given the opportunity to do so, recourse to national courts should be avoided.

²⁵⁹Article 27 and 29 of the 1998 Rules

Part 18 : The power to withhold the award in case of non-payment

To ensure the payment of fees either the arbitrators' fees, or the institution's fees, the award can be withheld until complete payment is made by the parties.

Under section 56 of the 1996 Arbitration Act, arbitrators²⁶⁰ may refuse to deliver the award to the parties except upon full payment of their fees and expenses. It provides that they have a lien over the award for the purpose of securing payment of their fees. The mandatory status of the provision implies that the parties cannot alter their power. However a qualification to its mandatory aspect allows the parties to obtain the award while challenging their fees.

The English Act is the only text allowing arbitrators to exercise a lien over the award until full payment of the fees be made. The ICC Rules do not give arbitrators such a power but confer it on the Secretariat. The Secretariat must ensure that the costs of the arbitration have been fully paid to the ICC by the parties²⁶¹ before the signed award can be notified to them.

Part 19 : Conclusion of chapter 1

It has been seen above that the powers of arbitrators arise from the arbitration agreement itself and therefore from the parties' will. If the parties are wise enough to state these powers they wish to grant to arbitrators, then there is no problem. But, if the parties did not anticipate arbitral proceedings, they may not have established the list of powers they wish to give to arbitrators. In their arbitration agreement, they may list the different powers they are willing to give to arbitrators but they may also specify that they refuse to give a specific power to arbitrators such as the power to act as *amiable compositeurs*. The powers of arbitrators can be addressed during preliminary hearing if any or within the terms of reference for an ICC arbitration.

Regarding the arbitrators' powers, a quick review may be of interest.

All texts confer the power to conduct the proceedings on arbitrators i.e. to choose the procedure and also the power to consider their jurisdiction to decide the case. It is nowadays extremely rare to find texts which deny arbitrators the power to choose the procedure. If there is a restriction on their power, it is an express provision

²⁶⁰Including umpire and an arbitrator who has ceased to act as stated in section 56§5 of the 1996 Arbitration Act

²⁶¹By either parties or by the claimant who is usually asked to substitute to pay the costs of the arbitration (fees of arbitrators and administrative expenses decided by the ICA at the plenary session when adopting the final award).

authorising them to depart from the procedural rules of the courts²⁶². This is a recognition of the arbitrators' autonomy in handling the case. Such an attitude is definitely a recognition of the autonomy of the arbitration process. The powers relating to procedure are usually quite wide and are usually given without difficulty by the parties and the relevant legislation or institutional rules. With these procedural powers, arbitrators are given the capacity to deal with the case, to obtain the maximum of information and data to be able to decide the matter with a reasonable background.

The position of English law is finally clear arbitrators in England have now the power to decide as *amiable compositeur*. This is in itself a progress.

The power to fix time limits for the submission of documents in the course of the arbitral proceedings is given by every text. The power to choose the form of the statement of claim and defence is only contemplated by English law. But it can be implied in the other texts. This underlines the desire to allow arbitrators to run arbitral proceedings as they deem appropriate. This idea lies behind the power given to organise the hearings, and the power to organise the investigation of the facts. In both powers, the power of investigation and the power as to hearing, limits appear. Arbitrators sometimes lack coercive powers towards the parties to arbitration, and towards third parties on a general basis. As arbitrators lack coercive powers, the recourse to national courts is encouraged and sometimes necessary.

The power to order interim measures is generally granted to arbitrators, with the exception of the domestic Scottish arbitration legislation, which is too old²⁶³. Some uncertainty arises with the ICC article which is unclear and a source of difficulty, and which should be removed with the 1998 Rules. Here again, the coercive power of arbitrators is non-existent. The enforcement of interim measures of arbitrators is often delicate.

The powers given to the chairman, or umpire or oversman are envisaged in every text.

²⁶²In French law article 1460 NCPC and 1494 NCPC and in the Swiss Legislation article 24 of the Concordat and article 182 of the Private International Law Federal Act.

²⁶³Which will soon be changed with a more up to date legislation.

The power to render interim, or partial awards is not mentioned in French law, or in the Model Law. The power to award costs is not mentioned in the Model Law and is not available to arbitrators, because it is left to the ICA. The power to award interest is not mentioned in the French decree, in the ICC or in the Model Law. There is a consensus as to dissenting opinions : these are not envisaged in any text and they are unwelcome in France, whereas the ICA will consider them when scrutinising a draft award.

The power to correct, amend or interpret an award is given in all texts with the exception of the ICC Rules simply because the ICA checks draft awards and recommends corrections before their adoption by the ICA.

Finally, the power of arbitrators to withhold the award in case of non-payment is only envisaged in the 1996 Arbitration Act whereas the ICC only allows the Secretariat to do that.

Arbitrators seem to have wider powers now than they used to have in the past. The powers that are given to arbitrators might be wider than the powers of the judiciary in certain fields because arbitrators are allowed to disregard certain rules of evidence and of court procedure. When the parties choose to refer their disputes to arbitration, they should expressly state the powers they wish to give to arbitrators to ensure non interference in the arbitration by the court. Sometimes the parties will not do so or the legal systems do not allow the arbitrators to exercise specific powers ; thus national courts will intervene.

Most of these powers need the complementary assistance of the national courts or intervention from the ICA. It has been shown that recourse to national courts is sometimes needed to complement the arbitrators' powers, because they lack coercive powers and their decision cannot always be enforced without the national courts' assistance.

The arbitrators' powers are limited from several directions. Their powers are firstly limited by the parties. Such limitations can be imposed at the outset of the arbitration in the arbitration agreement or in the terms of reference for ICC arbitrations. They can specify the powers they want arbitrators to have. Their powers are also limited by the legislation governing the arbitration. The legislation can

impose certain requirements which are mandatory and should be complied with otherwise their breach would allow challenge of the final award.

The limits imposed on the arbitrators' powers can coincide with the duties that arbitrators should comply with in an arbitration. This will be studied in the following chapter.

Chapter 2 : The duties of Arbitrators

When arbitrators have accepted the reference of the dispute, they have to comply with several duties in order to carry out their mission in a proper way.

Part 1 : The duties related to independence and impartiality

1 : The duty to be and remain independent and impartial in the eyes of the parties.

The duty of independence and impartiality is difficult to study for several reasons. One difficulty lies in the delicate content and meaning of these concepts. Establishing the boundary line between the appearance of independence or the appearance of impartiality and the reality is rather arduous. As the qualities of independence and impartiality are considered vis-à-vis the parties' belief, what matters at the commencement of the arbitration is how these qualities are seen by the parties. The appearance of independence and impartiality matters to the parties, because it is easier to prove than the reality of independence and impartiality. The importance of the facts in relation to the independence and impartiality cannot be denied. Indeed they will be brought at their maximum significance when these facts putting into question the arbitrators' independence and impartiality are revealed either by the arbitrators themselves or discovered by the parties at a later stage in the arbitration. Arbitrators should in reality be truly independent and impartial.

Independence and impartiality are usually both required for arbitrators with some exceptions²⁶⁴. Both independence and impartiality are, usually, interchangeably used. Even if they are similar concepts they are truly different. Both are quite close in their function of protecting the parties, but they are nonetheless distant from each

²⁶⁴Like with the ICC Rules concerning impartiality and the 1996 Arbitration Act concerning independence for example.

other in their meaning and substance²⁶⁵. Indeed independence cannot ensure the impartiality of arbitrators and vice-versa. And where independence ceases, the appearance of partiality begins²⁶⁶. Nevertheless they are a security and a guarantee for the parties.

Independence refers to the relationship between parties and arbitrators while impartiality is a quality of spirit and relates more to the substance of the dispute. What is the meaning of independence? Independence is evaluated with respect to the parties. Independence is often construed to have specific reference to economic bonds between arbitrators and the parties. It can be said that arbitrators are independent from the parties if they do not have any link either professional or economic, or any personal interest in the resolution of the dispute. Like judges, arbitrators must resist any pressure whatever its kind to decide the case. Arbitrators should decide the case in accordance with their own conscience and with the elements put before them by the parties. Arbitrators should avoid any interference from the parties aiming at guiding their judgement. It is certainly difficult to struggle against pressure since arbitrators are often known to the parties or to their counsel. This is especially true in the closed world of international practice.

What is the meaning of impartiality? The quality of impartiality is really delicate to illustrate in practice. Arbitrators are said to be impartial if they have never been involved in any way with the facts, or if they have never written or expressed any opinion about the subject-matter. The impartiality issue also arises when arbitrators have been appointed for two connected arbitrations with or without the parties being aware. A dual appointment creates a certain disequilibrium²⁶⁷, which can be extremely dangerous. A single arbitrator, being aware of the other arbitration X related to arbitration Y, may possess documents or information, which are not introduced in arbitration Y. Consequently, his thinking process can be influenced by these factors which are unknown to the other arbitrators. If he informs his colleagues about what he knows, all members might be influenced by those factors²⁶⁸ which were

²⁶⁵ 'Les deux notions, si elles se rejoignent dans leur finalité, ne se confondent pas dans leur contenu. L'indépendance du juge est une donnée objective, l'impartialité une donnée subjective.' R. BADINTER L'impartialité de l'arbitre in Petites Affiches 1991. 5 (Hereinafter BADINTER in Petites Affiches 1991)

²⁶⁶ K.P. BERGER *INTERNATIONAL ECONOMIC ARBITRATION* 1993 p245

²⁶⁷ The parties choose, sometimes, to reduce the risk in initiating two arbitral process for a huge and complicated dispute involving several different parties in order to reduce the risk. C. REYMOND Connaissance personnelle de l'arbitre à son information privilégiée : Réflexions sur quelques arrêts in Rev. Arb. 1991. 8.

²⁶⁸ Une convention est nulle au sens de l'article 1502 (1) NCPC lorsque le consentement donné par l'une des parties à la convention l'a été dans l'ignorance de rapports d'intérêt existant ... entre ce

not properly introduced in arbitration Y in compliance with the adversarial proceedings and with a fair process. In a second set of circumstances undermining impartiality, the arbitrators' previous attitude can be held to be hostile for at least one of the parties. It can be a decision in a former case or an opinion expressed during a conference or published in a review on this very matter. It can also be their behaviour during the arbitral proceedings themselves.

In England

The 1996 Arbitration Act states the general duties of arbitrators. Section 33§1 stipulates that arbitrators shall 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case with that of its opponent'. Section 33 § 1 lays down two obligations imposed on arbitrators in their handling of a dispute : acting fairly and impartially as between the parties, giving them a reasonable opportunity of putting its case and adopting suitable procedures to the case with a view to avoid delay and unnecessary costs. This provision is drafted in the widest terms and is mandatory. Its mandatory nature was justified in the drafters' mind because proceedings, which depart from the stipulated duties could not be properly be described as an arbitration²⁶⁹. It is clear from this provision that arbitrators should act impartially. Arbitrators whose partiality is reasonably in doubt, may be removed either by the parties acting jointly or by an institution or a person vested with the power²⁷⁰ and finally by the court²⁷¹.

A noticeable lack in the arbitrators' qualities is the absence of the requirement of independence from the parties. Such an omission was deliberate by the DAC. The drafters considered that the quality of impartiality covered the quality of independence which is different from the previous law²⁷². The arbitrators' quality of impartiality is here presented in the light of their general duties in conducting arbitral proceedings, of their general behaviour and their conduct towards each of the parties during arbitral proceedings. Thus, the keynote of their conduct towards the parties is that of fairness and impartiality as between them.

dernier et une société dépendant du groupe auquel appartenait une des parties à l'arbitrage.' *Société Annahold BV et autres v SA L' Oreal et autres*, Appeal Court of Paris, 9th April 1992 in D. 1992 IR. 173

²⁶⁹ DAC 1996 Report § 150 p35

²⁷⁰ Under section 23 of the 1996 Arbitration Act

²⁷¹ Under section 24 of the 1996 Arbitration Act

²⁷² The duty to be impartial and independent was also clearly required in the 1950 Arbitration Act (section 24) since English courts have the power to relieve arbitrators on the grounds of partiality. In reality, English arbitrators have to be impartial and remain so during arbitral proceedings.

In France

Even if the NCPC does not mention these qualities²⁷³, both impartiality and independence are required and the case law is unambiguous about it²⁷⁴. The requirement of impartiality and independence for judges has clearly been established²⁷⁵. As arbitrators are considered as private judges, they are also required to perform their judicial mission with impartiality and independence. French courts have established the limits and the meaning of independence in the case law²⁷⁶. They established that independence from the parties²⁷⁷ is a necessary quality for arbitrators and the essence of their mission. More recently, Appeal Courts emphasised again the independence of the chairman of an arbitral tribunal²⁷⁸ and underlined the need for arbitrators to have a sufficient independence of spirit and a necessary impartiality to accomplish their mission, otherwise it would not be in conformity with the parties' expectation²⁷⁹. In the *Société Philip Brothers v Société Drexel and others*, the court said that recourse to arbitration is essentially based upon the trust put in the arbitrators' independence and impartiality by the parties²⁸⁰. The court also indicated that both qualities of independence and impartiality must be considered in the eyes of

²⁷³Indeed the NCPC makes an indirect reference in article 1452§2 NCPC and in article 1463 NCPC in dealing with the causes of disqualification.

²⁷⁴For a detailed overview of the subject see FOUCHARD & GAILLARD & GOLDMAN *TRAITE DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* 1996 p580 onward (Hereinafter FOUCHARD & GAILLARD & GOLDMAN 1996)

²⁷⁵R. PERROT *INSTITUTIONS JUDICIAIRES* 1995 p360 to 362 (Hereinafter PERROT 1995)

²⁷⁶'L'indépendance d' esprit est indispensable à l' exercice du pouvoir juridictionnel des arbitres. Quelle qu' en soit la source, elle est une des qualités essentielles de l'arbitre'. *Ury v Société Anonyme des Galeries Lafayette, Cour de Cassation*, 13th April 1972 in D.1973. 2. 'L'indépendance de l'arbitre est l'essence de sa fonction juridictionnelle, en ce sens que d'une part il accède dès sa désignation au statut de juge, exclusif par toute nature de dépendance, notamment avec les parties et que d'autre part, les caractériser par l'existence de liens matériels ou intellectuels, une situation de nature à affecter le jugement de l'arbitre en constituant un risque certain de prévention à l' égard de l' une des parties'. *Société Annahold BV et autres v SA L' Oreal et autres*, Appeal Court of Paris, 9th April 1992 in D.1992. 173

²⁷⁷*Ury v Société Anonyme des Galeries Lafayette, Cour de Cassation*, 13th April 1972 in D. 1973. 2

²⁷⁸*Kuwait Foreign Trading Contracting and Investment Company (KFTCIC) v Icori Estero*, Appeal Court of Paris, chambre suppl.1, 28th June 1991 in Rev. Arb. 1992. 568. The dispute has its origin in a contract signed between the Kuwaiti company and the Italian company for the building of the Kuwaiti embassy in Algeria. The KFTCIC challenged the award on the ground, among others, that the chairman of the arbitral tribunal was not independent as himself and the lawyer of the Icori Estero party had connection (both were members of the same Chamber of Barrister in London). As the KFTCIC discovered those facts several months after the constitution of the arbitral tribunal, then KFTCIC unsuccessfully challenged the award.

²⁷⁹*Société Philip Brothers v Société Drexel*, TGI Paris 29th June 1989 in Rev. Arb. 1990. 506 'le recours de l'arbitrage se fonde essentiellement sur la confiance de l'arbitrage désigné qui comme le juge, doit statuer en toute indépendance et impartialité'. p508

²⁸⁰*Société Philip Brothers v Société Drexel et autres*, TGI Paris (interlocutory order), 14th June 1989 in Rev. Arb.1990. 497 at 508

the parties. In the light of the above, French courts are extremely strict with the implementation of these qualities. It can be said that judges are extremely cautious with respect to the fundamental principle of trust between parties and arbitrators²⁸¹. As arbitrators are seen as a kind of judge, they are expected by courts to comply with these qualities as judges do.

In the ICC Rules

Pursuant to article 2§4 of the 1988 Rules, every party-appointed arbitrator must be independent from the party appointing him. In article 7§2 of the 1998 Rules, every arbitrator must be and remain independent of the parties involved in arbitration. This provision will create a slight difference with the 1988 Rules because every arbitrator was required to be independent from the party appointing him only and not from all parties involved in the arbitration. Article 2§7 of the 1988 Rules emphasises the obligation of independence for all arbitrators once appointed or confirmed by the ICA. Article 7§2 of the 1998 Rules also clearly requires that arbitrators remain independent from the parties throughout the arbitration. The ICC Rules speak of the appearance of independence in the eyes of the parties. Arbitrators must be and remain independent from the parties involved in arbitration throughout arbitral proceedings.

The ICC Rules speak only of independence and not of impartiality. The reason for this lies in the fact that the drafters of the 1988 Rules preferred to avoid it since mention of it was made too late before the completion of the rules and above all because the proposed definition was not sufficiently satisfactory²⁸². At a recent session of the ICC Commission of International Arbitration²⁸³, the inclusion of impartiality in the 1998 Rules was again refused. Its absence must not be understood as an acceptance of the partiality of arbitrators as long as they are independent. And with reference to article 2§8 of the 1988 Rules providing that arbitrators could be challenged whether for an alleged lack of independence or otherwise, one may conclude that the quality of impartiality is here being indirectly referred to and

²⁸¹S. ROZES in THE ARBITRAL PROCESS AND INDEPENDENCE OF ARBITRATORS ICC 1991. 114 (Hereinafter ROZES in ARBITRAL PROCESS 1991)

²⁸²S. BOND in THE ARBITRAL PROCESS 1991. 11

²⁸³27th February 1997 at the ICC headquarters. That day the ICC Commission of International Arbitration was discussing the later version of the Draft Revised Rules (1998 Rules). The ideas developed during that session were that the ICA must send the signal that it will only appoint independent arbitrators. Problems arise when a party designates an arbitrator who submitted a qualified statement of independence to the Secretariat, if the ICA confirms him, it does not mean that the ICA agrees with such a practice, but as long as the opposing party did not challenge him, then nothing can be done.

recognised. With these articles, the ICC Rules establish a portrait of ICC arbitrators. In practice, the prospective arbitrator has to show in his statement of independence, that he is indeed independent. Its form states that any prospective arbitrator must declare that 'there are no facts or any circumstances, in the past or the present, that need to be disclosed because they might be of such a nature as to call into question his independence in the eyes of any of parties'. The form further states that the prospective arbitrator must 'take into account *inter alia*, whether there exists any past or present relationship, direct or indirect, with any of parties or any of their counsel, whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for'. The 1998 Rules do not bring many changes to this practice but it seems to be more stringent as to the quality of independence ; as arbitrators must be and remain independent of the parties involved in the arbitration.

In Scotland

Scots law requires both impartiality and an 'open mind' approach towards the dispute for arbiters. The latter quality of judging with an open mind could be assimilated to the quality of independence if used with a more modern terminology. Scots law requires arbiters to be impartial and they should not have any interest in the dispute²⁸⁴. Arbiters must not show any prejudice against one of the parties or about the subject-matter of the dispute and must decide the dispute with an open mind. Thus Scots law recognised the partiality of arbiters as a major defect resulting in their challenge²⁸⁵.

To have an idea how Scottish courts have interpreted in practice the interests of arbiters, let us consider some examples. It was common practice to make the engineer or the architect of work being executed under the contract the arbiter of all disputes

²⁸⁴Bell considered the arbiter's impartiality as being a direct consequence of the judicial character of his office : 'an arbiter should stand absolutely indifferent between the parties-submitters. His office (...) requires complete impartiality as one of its inherent attributes'. Bell followed this requirement with an explanatory example : 'if the arbiter has a patrimonial stake in the subject of dispute, coincident with the interest of one of the parties and consequently opposed to the interest of the other; and if that stake be sufficient to create a bias in the mind of any ordinary man... It was the duty of the opposite party to have disclosed the existence of the partial interest affecting the arbiter if he was aware of its existence. And even if both parties were alike ignorant it was incumbent on the arbiter himself to have expressly discovered it to the parties and to have declined to accept office the duties of which were incompatible with the existence of any interested bias in his mind'. BELL 1877 p130 § 234 and IRONS & MELVILLE 1903 p119

²⁸⁵*Fleming's Trustees v Henderson* 1962 SLT 402 at 406 Lord Kilbrandon also insisted on the fact that the impartiality of arbiters 'is something which the courts must be anxious to enforce'.

relating thereto. In several cases²⁸⁶, the fact that arbiters were employees of one of the parties was not contemplated as a source of disqualification. Under other circumstances the courts disqualified arbiters for their previous actings, previous opinions or positions²⁸⁷. The conclusions which can be drawn from these examples are manifold. The boundary line between those examples is sometimes not easy to establish. In the cases where arbiters were employees of one of the parties, which was definitely not the best practice in terms of respecting the qualities²⁸⁸, the courts should have chosen a more rigorous approach and disqualified them. It might be suggested that this interest, even at the slightest, should have been a major source of disqualification. It was nonetheless a good incentive for the firms willing to have their men as arbiters. With the current rules and their implementation in practice, such a practice would certainly be criticised. A criticism can surely be made, but it must be qualified if both parties agreed to have one employee of one of the parties to arbitration as the arbiter. As long as both parties have agreed with such a choice, nothing can be said against it.

The case of *Graham House Investments Ltd v Secretary of State for the Environment*²⁸⁹ deals with the appearance of the arbiter's impartiality in the eyes of the parties. The appointed arbiter was asked to act for the price determination of the first floor premise and as an expert to establish the rental price for the second floor premise within the same building. Both appointments were accepted by the arbiter with the parties' knowledge. The arbiter was called upon by the tenants (the Secretary of State) of the first floor premises to resign on the grounds that he could no longer approach the issue under arbitration with an open mind. The tenants thought that the decision which the arbiter as an expert had reached on the fair rental of the second floor premises would prevent him from dealing with the question in the arbitration with an open mind. The question put to their lordships was whether in the circumstances in the case the arbiter should be disqualified²⁹⁰.

²⁸⁶In *Adams v Great North of Scotland Railway Co* 16 R 843 and in *Anderson v Aberdeen Railway* 12 D 781 per Lord Cowan

²⁸⁷In *Mac Laughlan & Brown v Morrison* (1900) 8 SLT 279, the arbiter was disqualified due to a letter he wrote in which he expressed an opinion contrary to one of the parties' interests.

²⁸⁸Both parties must be aware of these special circumstances.

²⁸⁹*Graham House Investments Ltd v Secretary of State for the Environment* 1985 SLT 502

²⁹⁰The court (Lords Wheatley and Dunpark) gave a negative answer to this question on the grounds that the opinion given previous to the arbitration would not influence the arbiter because the two cases were dissimilar and because the second floor premises valuation did not commit the arbiter to a figure for a different floor, of a different size and with a different review date. For both Lords, the opinion previously stated before the arbitration did not prevent the arbiter from deciding with an open mind. In his dissenting opinion, Lord Hunter took the opposite view because he felt that the arbiter

The case illustrates very well the appearance of an open mind decision in the eyes of the parties. In the writer's view, a previously given opinion should not always be seen as preventing an open-minded decision. If an arbiter honestly believes and proves to the parties that he should be able to distinguish both cases, and perceive their differences, and if both parties agree to let him do his mission, then he should be given a chance to prove his ability to decide with an open mind. This solution is obviously dangerous because how can the parties know that the arbiter will really decide the case with an own mind. They are indeed taking a risk, but it their choice. If the parties feel that he should not be given the chance to prove his openness of mind, challenging the arbiter is the option left to them.

The Model Law requires the qualities of both independence and impartiality for prospective arbitrators²⁹¹. It only mentions these qualities when it addresses the duty to disclose any circumstances that could give rise to justifiable doubts as to their independence and impartiality or when the Model Law considers the appointment of arbitrators by the appointing authority (a court)²⁹². Despite its indirect mention in the text, it has been said that the requirement of independence and impartiality is a mandatory provision from which parties cannot derogate and such a view is to be emphasised²⁹³.

In adopting the Arbitration Rules, it was added that any member of the Iran-US Claims Tribunal should remain independent and impartial and that he should disclose any circumstances likely to give rise to justifiable doubts as to their impartiality and independence with respect to that case²⁹⁴. As long as the duty to disclose any circumstances likely to give rise to justifiable doubts as to the impartiality and independence is imposed upon arbitrators, the need for their independence and impartiality is undoubtedly recognised. These qualities should be complied with without any hesitation.

Conclusion

It has been shown in this section that arbitration laws aim at preventing arbitral awards from being impaired because arbitrators lack independence and impartiality in

would be unable to regard the matter with objectivity. *Graham House Investments Ltd v Secretary of State for the Environment* 1985 SLT 502 at 507-509

²⁹¹ Article 12 and article 11 of the Model Law

²⁹² It is the same with the ARBITRATION Rules

²⁹³ HOLTZMANN & NEUHAUS 1989 p409

²⁹⁴ ABERCROMBIE BAKER & DAVIS 1992 p249

the eyes of the parties. For this very reason, statutes demand that arbitrators be and remain independent and / or impartial throughout arbitral proceedings.

The perception of independence and impartiality in the eyes of the parties is indeed at the heart of the problem at the outset of the arbitration when they are looking for potential arbitrators. The parties will base their choice upon what the potential arbitrator will disclose but also upon the appearance of independence and impartiality. Institutional bodies in charge of appointing or confirming arbitrators rely on facts that might put into question the independence and / or impartiality of arbitrators. For an ICC arbitration, for example, every potential arbitrator must disclose in his statement of independence every fact or event which might be of such a nature as to call into question his independence. For its decision the ICA relies on facts to decide whether or not to confirm the arbitrator's appointment.

Statutes certainly aim at bringing transparency in the arbitral process to ensure that justice is done. If the parties believe that arbitrators are independent and impartial, then the arbitral process is safe. If the parties' belief is erroneous, they discover it in time, the arbitrator can be challenged. To reach that aim, statutes usually impose upon arbitrators a duty of disclosure of any facts or circumstances undermining the impartiality or independence giving rise to justifiable doubts.

2./ The duty to disclose any facts or circumstances undermining impartiality or independence

There is wide acceptance of the necessity for arbitrators to be and remain independent and / or impartial throughout the arbitral process²⁹⁵. It is possible to find an indirect emphasis on these qualities when the rules require the immediate disclosure to the parties prior to or after arbitrators' appointment of any circumstances giving rise to justifiable doubts.

Arbitrators who have knowledge of a personal cause of disqualification must inform the parties. It is only after the performance of the duty and the confirmation of their appointment, if it is required by the rules, that they will be said to be finally appointed. These relationships or bonds between arbitrators and the parties can be of several kinds : if they were or are still working for the parties as counsel or as expert; if at the time of the signature of the submission agreement, they have any professional relationships with the parties; if there is any personal acquaintance between the parties and arbitrators; if there is an economic bond ; or if they have been given a position in

²⁹⁵Like the LCIA Rules (article 3), the UNCITRAL Arbitration Rules, the ISCID Rules (article 14.1)and the AAA Rules (article 19).

the company which won its case. If any of these situations arises, arbitrators ought instantly to disclose them as, if unknown to the parties, they could cause irritation and endanger the arbitral process. If unknown and discovered later on by the parties, it may be felt that arbitrators lied about these facts. And these unknown facts may jeopardise more than the arbitrators' independence and impartiality and give a bad impression. A late discovery of facts giving rise to justifiable doubts in the eyes of the parties will in the end destroy the trust the parties had in arbitrators.

In England

There is no provision in the 1996 Arbitration Act that mentions the duty to disclose any facts, circumstances or relationships that could give rise to justifiable doubts as to the arbitrators' impartiality in the eyes of the parties.

The DAC did not follow the Model Law's tendency. The DAC privileged the 'old rule' that lack of independence is significant only where it leads to justifiable doubts about the arbitrator's impartiality²⁹⁶. Such a duty can nonetheless be implied in accordance with section 24 of the Act. It entitles the court to remove arbitrators if there are circumstances that give rise to justifiable doubts as to their impartiality²⁹⁷.

The DAC was not convinced that the duty to disclose was required or desirable so that it should be mentioned²⁹⁸. Given this provision, the duty to disclose should be carried out by arbitrators in order to avoid any further difficulty and potential removal. And in accordance with section 23, the parties jointly or any institution, or any person vested by the parties with the powers in that regard, may revoke the appointment of arbitrators. As there is freedom to agree on the circumstances which give rise to the power to revoke their appointments, the parties may revoke their appointment if justifiable doubts as to their impartiality have arisen. In the end, the duty to disclose should be carried out by arbitrators with a view to avoiding the potential revocation of their appointment by the parties or their potential removal by the courts.

²⁹⁶ MERKIN R. chapter 21 p42

²⁹⁷ DAC 1996 Report p26

²⁹⁸ Under section 24§1§a of the 1996 Arbitration Act. In the prior law, the courts could already remove an arbitrator who did not disclose personal interests and gave an appearance of bias, under section 24 of the 1950 Arbitration Act. The 1996 Arbitration Act replaces the concept of judicial revocation of authority with the power of removal. Section 24 sets out in detail the grounds upon which an arbitrator may be removed. MERKIN R. chapter 21 p42

In France

French law endeavours to provide a certain guarantee with article 1452 NCPC requiring a spontaneous disclosure to the parties of any circumstances and facts that could give rise to justifiable doubts in the eyes of the parties.

For the *Cour de Cassation*, the obligation to inform²⁹⁹ the parties relates to the facts set forth in article 431 NCPC³⁰⁰. As arbitrators are private judges, such an assimilation of the causes of disqualification is not astonishing. Indeed in the case of *Compagnie Graine d'Elite*³⁰¹, the *Cour de Cassation* established a strict rule whereby there is no cause of disqualification without the legal basis of article 431 NCPC. The position is too strict because this article should only be applied to state judges³⁰². In the writer's view, the implementation of article 431 NCPC does not cover the variety of cases met in reality. Article 1452 NCPC and 1463 NCPC do not expressly list the causes of disqualification. As there is no list of the circumstances for the causes of disqualification, this allows a less rigid approach which is preferable. A case by case approach is then possible. A certain latitude allowing adaptation to the circumstances of the case seems the best option rather than the strict yoke of article 431 NCPC which was originally designed for judges³⁰³. French law has then opted for a liberal approach with article 1452 NCPC when it did not expressly specify the cause of disqualification. Such a choice definitely fits better for international arbitration practice.

²⁹⁹ 'L'obligation d'information qui pèse sur l'arbitre afin de permettre aux parties d'exercer leur droit de récusation doit s'apprécier à la fois de la notoriété de la situation critiquée et de son incidence raisonnablement prévisible sur le jugement de l'arbitre.' *Société Annahold BV et autres v SA L' Oreal et autres*, Appeal Court of Paris 9th April 1992 in D. 1992 IR. 173

³⁰⁰ Article 431 NCPC stipulates that the basis for disqualification for a judge and arbitrator are the following : 1- if himself or spouse has a personal interest in the dispute (for example being a shareholder of a company which is a party to the dispute). 2- if himself or spouse is a creditor, a debtor, a heir or someone who received a settlement from one of the parties. 3- if himself or spouse is a relative of one of the party. 4- if there was a suit against himself or spouse. 5- if he has already dealt with the subject-matter of the dispute as a judge or arbitrator or counsel for one of the parties. 6- if the judge or spouse was in charge of running the businesses of one of the parties. 7- if there is a link of subordination between the judge or spouse and with one party or spouse. 8- if there is a friendship or notorious enmity between judge and one of the parties.

³⁰¹ The *Compagnie Graine d'Elite* challenged the arbitral award before the Appeal Court of Aix en Provence on the ground that the arbitral tribunal was irregularly formed. The plaintiff accused the chairman of the arbitral tribunal of having breached article 1452 NCPC. The parties accused him of not having informed the parties about his judicial past and his integrity. The Appeal Court refused to depart from the text of article 341 NCPC as the only possible basis of disqualification. The *Cour de Cassation* confirmed this decision and insisted on its good reasoning as being rightly justified. *Graine d'Elite clause v Gerin*, *Cour de Cassation*, 14th November 1990 in Rev. Arb. 1991. 75

³⁰² P. FOUCHARD Le statut de l'arbitre dans la jurisprudence française in Rev. Arb. 1996. 325 at 350

³⁰³ TGI of Paris, 28th October 1988 and 29th June 1989 in Rev. Arb. 1990. 497

In the ICC Rules

The duty to disclose any facts or circumstances which might be of such a nature as to call into question the arbitrators' independence, is brought to its maximum significance as the prospective arbitrator will not be appointed and confirmed without compliance with it. When the prospective arbitrator submits a qualified statement of independence, it is carefully examined by the counsel in charge of the case and later by the Secretary General and the ICA members before being formally appointed³⁰⁴. Pursuant to article 2§7 of the 1988 Rules and article 7§1 of the 1998 Rules, the prospective arbitrator must disclose any facts or circumstances which might be of such nature as to call into question his independence.

In reality³⁰⁵, counsel in charge of the case must provide this information to the parties and fix a deadline for their comments. If the parties do not raise any objection to the facts submitted by the prospective arbitrator, the ICA will formally appoint him. If the parties raise any objections, they will be examined by the ICA and a decision will be taken whether or not to appoint the arbitrator³⁰⁶. The same process is followed for a potential disclosure after the confirmation of the appointment and before the notification of the final award. The facts or circumstances which might be of such a value as to call into question the arbitrators' independence submitted together with the statement of independence (namely a qualified statement) will be transmitted to the parties for them to voice their objections, if any.

The duty to disclose encompasses a wide range of situations. Arbitrators must disclose relationships, interests or opinions which they believe may jeopardise their independence but also facts which the parties might consider as impairing their

³⁰⁴With the entering into force of the 1998 Rules, the confirmation of the arbitrators' appointment will be made by the Secretary General as a rule. Pursuant to article 9§2 of the 1998 Rules, the Secretary General may confirm co-arbitrators, sole arbitrators and chairmen of arbitral tribunals person nominated by the parties or pursuant to their particular agreements, provided that they filed a statement of independence without qualification or a qualified statement that has not given rise to objections by the parties. Such confirmation shall be reported to the ICA at its next session. If the Secretary General considers that an arbitrator should not be confirmed, the matter shall be submitted to the ICA. Hence, one step will be avoided, this should reduce the time necessary for the confirmation of arbitrators.

³⁰⁵This has been remarked during my internship at the Secretariat of the ICA.

³⁰⁶The practice of the ICA shows that the ICA is very reluctant to appoint arbitrators upon proposal of a National Committee in the case where said nominees have filled qualified declarations of independence. The ICA would appoint the arbitrator who submitted a qualified statement subject to the comments of the parties within 15 days. Where the prospective arbitrator is proposed by a party to arbitration, the ICA would examine the facts underlined in the qualified statement of independence. Depending upon the circumstances of the case, the atmosphere between the parties i.e. an hostile environment among the parties or a cordial atmosphere, it might be preferable not to appoint an arbitrator when the parties have voiced their objections. If they did not express their disagreement, the arbitrator might be confirmed if the facts do not seem to serious.

independence. A real emphasis is put upon the parties' opinion with a view to eliminating the appearance of partiality if the facts are not disclosed³⁰⁷.

The ICA is rigorous with the matter since it considers this duty to disclose as being one of the primary obligations of arbitrators. In doing so the ICA certainly avoids constant recourse to the challenge of arbitrators. Once the parties are aware of the facts impairing the arbitrators' independence and if they nevertheless decide to keep them, challenge of arbitrators is usually avoided.

In Scotland

The Model Law requires compliance with the duties of independence and impartiality throughout the arbitral process from beginning to end. Therefore, article 12 imposes the duty upon arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality and independence in the eyes of the parties. The duty is imposed at two different stages. At the outset of arbitration, when arbitrators are approached in connection with their possible appointment, they should disclose any circumstances likely to give rise to justifiable doubts without any specification about to whom such a disclosure should be made. The second step available to the parties will be the possible challenge of arbitrators because of their potential bias. These qualities must also be respected during the arbitration process and if any circumstances arise hindering them, arbitrators should then make disclosure, without any delay, to the parties.

If the Model Law imposes an obligation of disclosure on arbitrators, Scots law never really imposed such an obligation as the recourse was for the award to be reduced for misconduct by the arbiters³⁰⁸. Even if such a duty was never expressly required, Bell observed that it was 'incumbent'³⁰⁹ on arbiters to do so. Even if not

³⁰⁷CRAIG & PARK & PAULSSON 1990 p225

³⁰⁸Under Scots law, arbitrators could be removed as to prevent them from continuing to act in the arbitration if they showed bias against one party. If the courts believed that the arbitrator in question is impartial or independent, it is not appropriate to disqualify him. See for example *Graham House Investments Ltd v Secretary of State for the Environment* 1985 SLT 502 and *Fleming's Trustees v Henderson* 1962 SLT 402. But if the courts believe that the potential arbitrator is not impartial or independent, he is removed. For example *Caledonian Railway Co v Magistrates of Glasgow* 25 S 74 (where the arbiter had not acted as consulting engineer but he had assisted the corporation in preparing the sewage scheme. The court decided that he disqualified himself by his acting). *Mackenzie v Clark* 7 S 215 (The arbiter named in a contract became involved with the matter in dispute so as to disqualify himself from acting as an arbiter). *Tennent v MacDonald* 14 S 976 (The arbiter named in the lease subsequently became the partner in business of one of the defenders and he was disqualified from acting on account of his interest.) and *Mac Lauchlan & Brown v Morrison* 1900 SLT 279 (the arbiter wrote a letter in which he expressed quite clearly his pre-judgement of the question.)

³⁰⁹It was incumbent on the arbiter himself to have expressly discovered it to the parties'. BELL 1877§234 p130.

mentioned in statutes it might be suggested that it was a moral duty to do so. The writer's belief is that arbiters did so with the hope that they were safe for their future career and maybe in order to respect certain ethical standards. If the parties are willing to keep them despite their potential bias and if the parties are aware of it, then they are said to have waived their right to object. As Lord President Kinross observed where arbiters have 'an interest in the subject of the reference well known to parties before they enter into the submission, the award is good notwithstanding this interest'³¹⁰. The award is, accordingly, considered valid and the parties cannot object on the ground of the interest shown by arbiters, otherwise they should have challenged them at the outset of the arbitral proceedings³¹¹.

Conclusion

The study above shows that all legislative regimes demand that arbitrators be independent and impartial. The independence and impartiality, if both are required, are to be determined in the perspective of the parties. However, the real difficulty arises with implementing the test. The test used in countries may radically vary from a rigorous approach to a certain laissez-faire approach. In France, an objective appearance of impartiality is required as it would be expected from a judge. In England the test was a real suspicion of bias but now the appearance of impartiality in the eyes of the parties is applied. Both the AAA Code and the IBA Rules encompass rules of disclosure of any circumstances capable of affecting the independence and impartiality of arbitrators. In both sets of rules arbitrators are left with the choice of doing so and with the task of deciding which facts are worth mentioning. The difficulty that is likely to arise is the discretion left to arbitrators regarding their choice as to what to disclose. In practice every arbitration is a special situation which the provisions of any set of rules may not cover.

Both the AAA and IBA guidelines should only be considered as a useful reminder. However the intention behind the codes' development was to fill a gap and clarify the situation regarding a party-appointed arbitrator's behaviour. A universal

³¹⁰In *Buchan v Melville* (1902) 4F 620

³¹¹In *Fleming's Trustees v Henderson* 1962 SLT 402, it was held by the actings of an accountant as a member of the firm which prepared the balance sheet did not preclude him from discharging the duties of arbiter. (In earlier years he had been personally concerned with the accounts of partnership; he has been personally concerned with the preparation of the balance sheet; his partner was for a time one of Mr Fleming's trustee and so on). The arbiter was said to be disqualified by reason of his conflicting interests. However both parties were aware of those facts when arbitration was initiated. Therefore the conflicting interests of arbiter cannot be challenged now. It should have been done before.

standard of independence and impartiality is desirable but is not achievable in reality as every situation cannot be foreseen when drawing up a code even if it is a detailed code. The best solution is to consider the facts of each case. The present writer believes that each case requires an evaluation of the relevant facts and no code may encompass every situation that can be met in present practice. Thus the solution to support is the ICC method whereby every prospective arbitrator is confirmed after careful consideration. But this implies that the parties must have recourse to institutionalised arbitration to have a supervising body which could be in charge of this issue.

Compliance with the duty to disclose any facts impairing independence and impartiality is a major duty of arbitrators. After an '*examen de conscience*', arbitrators ought to take the initiative of informing the parties of anything undermining their impartiality and independence at any time before and during the arbitration. By disclosing these facts, arbitrators usually avoid the parties' suspicion and it aims at establishing a positive feeling of trustworthiness for the arbitral process. A strict enforcement of the duty to disclose can have a positive impact on the parties and should avoid recourse to the challenge of arbitrators. Such challenge is always an annoying defect for the arbitration process : in the best situation it will only postpone it, or delay it and in the worst situation it will put an end to it. If the strict implementation of the duty to disclose can avoid such challenge, then such a duty deserves to be implemented in its strict terms. This is believed to be the rationale behind the duty of informing the parties.

Part 2 : The duties whose breach amounts to serious irregularities

Both duties that will be studied in the section are very special. Originally from English law, both duties relate to the behaviour of arbitrators in the course of arbitral proceedings. In fact, if arbitrators do not abide by these duties, it might amount to serious irregularities and they might be removed from office by English courts or their award might be set aside.

1 : Duty to take care

The same care in performing their mission is required from those acting as arbitrators as it is for any professional like architects, doctors or experts, because the exercise of their profession implies that they have a certain duty to take care. If arbitrators do not carry out their office with care, their mission might be put at risk

because of their misconduct. The 1996 Arbitration Act has eliminated the ground of misconduct (the technical or other misconduct of arbitrators will not be a ground for challenge) for a more user-friendly ground i.e. serious irregularities.

The 1996 Arbitration Act does not specify the duty to take care. Section 33 sets out the general duty of arbitrators, among them that they should conduct the proceedings in a proper way. Section 24, dealing with the removal of arbitrators by the court, says that they can be removed if they improperly fail to conduct the proceedings. The need for arbitrators to conduct the proceedings in a proper way is emphasised. It is obvious that the duty to conduct the proceedings is not alike with the duty to take care ; because it is too narrow as the conduct to the process is limited while the duty to take care relates to the whole arbitral process. The duty to take care has not been removed by the 1996 Arbitration Act. Arbitrators should still take care in relation to the arbitral process and conduct the arbitration in proper way.

2 : Duty to proceed diligently

A reasonable speed should characterise the handling of the case. Arbitrators should not delay the course of arbitral proceedings without good reasons. Originally stated in English law³¹², the duty to proceed with diligence is also found in the French legislation and the ICC Rules with time limits being imposed for the completion for arbitral proceedings and the rendering of the final award.

If arbitrators do not proceed with diligence and exceed the time limits they could be liable and be removed by the courts. When the delay occurs at the beginning of the reference, or when delay occurs at a latter stage this might result in serious financial loss for the parties. In the interest of the arbitral process, it would be better for arbitrators to decide on their own to proceed diligently rather than to proceed diligently for fear of being sanctioned. Under the ICC Rules, there is a good incentive to proceed diligently. To calculate the arbitrators' fees, the ICA considers the diligence to proceed with the case and the speed in preparing the terms of reference and in submitting interim and / or final awards. The 1996 Arbitration Act does not expressly state a duty to proceed diligently. But it is implied because arbitrators should avoid unnecessary delays in conducting the arbitration³¹³. They should prevent the arbitration

³¹²Section 13§3 in the 1950 Arbitration Act. The 1950 Arbitration Act provided that the High Court may remove arbitrators who have failed to use all reasonable despatch in entering on and proceeding with the reference and the making of the award. And they were deprived of their remuneration.

³¹³Section 33§1§b of the 1996 Arbitration Act.

from becoming lengthy and costly. The Act underlines that arbitration should be a quick, speedy means of settling disputes as it is at the origin. Such an intention is reinforced by the fact that arbitrators can be removed by the court if they do not use all reasonable despatch in conducting the proceedings or in making the award³¹⁴. From the 1996 Arbitration Act, the idea to encourage arbitrators to act diligently is still included, but another wording is in use.

Conclusion

Both duties are originally found in English law, but one may find them between the lines of other statutes. Both duties are implied contractual obligations to be followed by arbitrators.

Part 3 : The duties as to procedure

1./ The duty to respect the 'principe du contradictoire'

In France, the good development of arbitral proceedings follows the essential principle of adversarial process, whereby each party may present its case and defend its position. Each party should have the opportunity to discuss and challenge the documents and proofs presented by the opposing party³¹⁵. In default, arbitrators or judges cannot rule upon the dispute put before them in an equal and fair way. The adversarial process protects the parties' interests and the rights of the defendant against the tactics of the opposing party and the negligence or partiality of judges or arbitrators³¹⁶. The adversarial process should be abided by throughout arbitral proceedings.

Both judges and arbitrators must ensure that the parties comply with the adversarial process. Under all circumstances, they must ensure that no party may be judged without having been summoned or heard³¹⁷. They should ensure that the parties have made known to each other, in good time, the facts on which they base their claims, the evidence they will produce and the law they will rely upon to enable each party to prepare its case. The respect for the adversarial process also binds arbitrators³¹⁸ because no party should be judged without having been summoned or

³¹⁴Under section 24§1§d of the 1996 Arbitration Act.

³¹⁵'Chacune des parties à la liberté d' attaquer et de se défendre, la possibilité de connaître et de discuter les documents produits, les témoignages déposés, d'assister à certaines procédures de preuve telles que l' enquête ou l' expertise'. J. VINCENT & S. GUINCHARD 1991 p318

³¹⁶J. VINCENT & S. GUINCHARD 1991 p319

³¹⁷Article 15 NCPC

³¹⁸Article 16 NCPC

heard³¹⁹. At the beginning of arbitral proceedings, each party should put its case, its plea of defence and should have a sufficient time to arrange its defence. During arbitral proceedings, arbitrators ask for disclosure of documents and exchange of the bill of complaints or the statements of case from each party. The representative of each party should have the opportunity to intervene and explain its position. When judges or arbitrators reach a decision, they must include only those grounds, explanations and documents relied upon or produced under the adversarial process³²⁰.

The adversarial process is also followed by the ICC arbitration and by the Model Law despite the fact that it is not directly mentioned in the ICC Rules nor in the Model Law. If the principle is not directly mentioned in the texts, this is usually because it was considered as being obvious and a widely accepted³²¹.

2 ./ The duty to provide the parties with a fair trial

It is common sense to require an equal treatment of the parties throughout arbitral proceedings to ensure compliance with the principle of natural justice. The principle whereby each party must be treated with equality implies that arbitrators should not favour one party more than the other. Arbitrators should not refuse to one party what they grant or allow to the other party³²². They have to keep in mind this principle whenever they decide to call for a hearing, a site inspection, a meeting, the testimony of a witness or expert and so on. In considering the timing of the delivery of pleadings, written submissions or expert reports or proofs or any documents, arbitrators should not be too optimistic and set such a short time as to deny to either party a reasonable period for preparing these items and its case. If one party is informed of any facts, transmitted documents, or given any document by arbitrators or by experts, the opposing party is entitled to the same treatment. Each party should be entitled to present its case, defend its position, and challenge its opponent's case. Hence, each party should be given the opportunity to be present at the hearing, if any. When arbitrators choose a date, a place and a time for an hearing they should try to satisfy both parties and if possible make it convenient to both parties, but above all they must inform them both of the relevant date, time and venue. If a defaulting party does not attend a hearing it must not be the result of the arbitrators' fault but only the party's choice.

³¹⁹Article 14 NCPC

³²⁰Article 16 NCPC

³²¹SCHWARTZ in CONFERENCE 1994 p34

³²²In 'documents-only' arbitrations, arbitrators may refuse to hear evidence because they have decided that the party's evidence should not be given due to the fact that the party's evidence is not relevant.

In England

A fair trial is a compulsory component for the good functioning of arbitral proceedings. Three principles must be observed³²³ : each party must have a full opportunity to present its own case to arbitrators, each party must be aware of its opponent's case and must be given the a full opportunity to test and rebut it and the parties must be treated alike. Each party must have the same opportunity to put forward its own case and to test that of its opponent.

Section 33§1§a of the 1996 Arbitration Act follows the trend in stating that arbitrators shall act fairly as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent. It derives from the Model Law (article 18). Its implementation is mandatory. Fairness as between the parties is a key point in the arbitrators' behaviour. Even treatment of each party is required by the expression 'giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.

In France

Arbitrators are under the obligation to respect the principle of equal treatment as between the parties. Its compliance ensures and guarantees that the parties will not be arbitrarily treated, otherwise the award would be put at risk in pursuance of articles 1502 and 1504 NCPC.

Under article 1460§2 NCPC, arbitrators have to follow the guiding principles of litigation³²⁴, respectively detailed in articles 4 to 10 NCPC, 11 § 1 NCPC (as to the object of dispute, the facts and proof), 13 NCPC and finally article 21 NCPC (as to the adversarial principle and the right of defence). Hence, the freedom of arbitrators conducting the arbitral procedure is limited by the obligation to respect the guiding principles of proceedings, which is essential for the quality of good justice. The legislators did not see any reason why arbitral proceedings should be free from these guiding principles. Hence, arbitral proceedings are to be conducted in accordance with the guiding principles of litigation³²⁵ which conduce to bringing arbitral proceedings to a high level of quality rather than to impeding their good functioning.

³²³MUSTILL & BOYD 1989 in chapter 22

³²⁴Please refer to Appendix 3 and 4.

³²⁵Article 1 to 21 NCPC with the exception of article 12 NCPC. Refer to Appendix 3 and 4.

The inclusion of the guiding principles of litigation in the arbitral process favours its closeness to state jurisdiction³²⁶. Furthermore, their insertion gives to arbitral proceedings a judicial nature³²⁷. It also brings recognition of its quality because arbitration is carried out in conformity with the principles laid down for state courts. Their inclusion appeared essential to ensure a higher quality to such a consensual justice with the guarantee of a fair justice. Hence, arbitrators are under the strict obligation to respect these guiding principles otherwise the award will be set aside.

French law imposes some limits to the freedom of the parties especially with respect to the guiding principles of litigation.

In the ICC Rules

The ICC Rules reflect the tendency by balancing the arbitrators' procedural discretion with the equal treatment of the parties and giving them a full opportunity to present their case. In the 1998 Rules, it is specified that arbitrators ought to give the party a reasonable opportunity to be heard³²⁸. The principle of fairness and equal treatment is found in several provisions. Under article 6§1 of the 1988 Rules, the copies of all pleadings and written statements must be supplied to each party. And any documents received in relation to the arbitration by arbitrators must be transmitted to the respective parties. Under article 14§1 of the 1988 Rules and article 21 of the 1998 Rules, arbitrators are obliged to hold hearings upon request or if they decide at their own initiative but they must inform the parties and notify them in person .

In Scotland

Article 18 of the Model Law enunciates the principle of fairness that should apply throughout the entire arbitral process. The principle enshrined in the provision is utterly mandatory and cannot be opted out of by the parties. Thus, one may say that the principle of fairness qualifies the parties' freedom granted them in choosing their rules of procedure on one hand but on the other hand it is a safeguard ensuring respect of their rights during the arbitral process. Pursuant to article 18, the parties must be treated with equality and they must be given opportunity to present their case. This suggests that arbitrators have the obligation to respect these principles and especially

³²⁶On the one hand, French drafters wanted to give a certain latitude in allowing arbitral proceedings to depart from the strict implementation of state courts rules but, on the other hand, they wanted to ensure a good justice and the respect of the parties' rights. They wanted to provide arbitration with a processual law which would give it a judicial character without outweighing it with the strict yoke of the procedural rules of state courts.

³²⁷ROBERT & MOREAU 1993 p133§156

³²⁸Article 15§2 of the 1998 Rules

in the areas where the Model law confers upon them a discretionary power to determine the rules of procedure.

In Scottish domestic arbitration, the principles of natural justice are *a sine qua non* condition for a good decision. It has long been established³²⁹ that a breach of the principle of fairness and refusal to hear a party mean that the decision will be set aside. In *Ridge v Baldwin*³³⁰ the House of Lords made clear that the implementation of these principles was mandatory for both English and Scottish courts. And such behaviour has to be followed by arbiters who must do equal justice between the parties³³¹.

Conclusion

Of the adversarial principle and the principle of a fair trial, it should be said that both principles are close and suggest more or less a similar respect for the parties' rights. For a civil law country, the reference is to the adversarial principle while the principle of a fair trial is the reference for a common law country. In civil law countries, like France for instance, arbitrators ought to ensure that arbitral proceedings are properly conducted. Arbitrators are the keepers of the good functioning of arbitral proceedings. In that respect both arbitrators from civil and common law background have the same duty to ensure that the parties are equally and fairly treated.

Some basic minimum requirements must be observed during the hearing³³². Firstly, each party must have notice of the date of the hearing to enable it to prepare its case. The arbitrators' mission is to ensure that both parties know about it. They must state clearly the date of the hearing for the parties.

Secondly, each party must have a reasonable opportunity to be present at the hearing together with its witnesses and advisers. Arbitrators must give time to the parties to prepare their defence. They should also try to find a time suitable for both parties and their advisers. But their duty does not require them to ensure the parties' attendance at the hearing as long as they had previously been informed of the venue,

³²⁹The early nineteenth century cases are concerned with instances in which inferior criminal courts breached basic principles of justice, with court officials who exercised their functions in cases in which they had a personal interest, with arbiters who made their awards without hearing both parties and so on. see *STAIR ENCYCLOPAEDIA* 1988 §250 p100.

³³⁰*Ridge v Baldwin* [1964] A.C 40 at 53

³³¹'For the condition of the equal footing on which the parties stand and of their equal right to inform the arbiter's mind, seems to me a necessary implication in the whole transaction'. *Mitchell v Cable* [1848] 10 D 1297 per Lord Fullarton at 1308

³³²See MUSTILL & BOYD 1989 p302 to 312

the date, the place of the meeting. If a party does not attend the hearing after all, arbitrators will not be responsible for this.

Thirdly, each party must have the opportunity to be present throughout the hearing. A party should not be excluded from any portion of the proceedings without its consent.

Fourthly, each party must have a reasonable opportunity to present its evidence and arguments in support of its own case. Arbitrators have to act in the right way and to prevent the parties from abusing their rights. They must receive all evidence tendered by each party; failure to do so would amount to misconduct from their part. Nevertheless, they have discretion as to the acceptance of evidence as long as they respect the parties' right to present their evidence and arguments.

Fifthly, each party must have a reasonable opportunity to test its opponent's case by cross-examining its witnesses, presenting, rebutting and addressing oral argument. The parties must have the opportunity to acquaint themselves with the case what they will have to meet.

Finally, the hearing must be the occasion for the parties to present the whole of their evidence and argument.

3 : The duty to accept the mission

From the acceptance of their mission, arbitrators will be totally in charge of conducting arbitral proceedings. Their acceptance of mission is the starting point for their duties and their liability.

In England

Arbitrators do not have to formally accept their mission. Nothing in the Acts requires such acceptance. It is nonetheless advised that arbitrators formally write back to the parties stating their acceptance in order for them to know whether or not their offer has been accepted.

In France

In a domestic arbitration, the requirement that arbitrators accept their mission is compulsory³³³ pursuant to article 1452 NCPC. As arbitrators may be displeased by the presence of another person or because a member of an arbitral tribunal may be challenged by a party, the acceptance of mission is only conclusive after the last arbitrator has accepted his mission. In international arbitration, the acceptance of their

³³³ Article 1452§1 NCPC

mission is not expressly made compulsory. No article is dedicated to that issue in the 1981 Decree. It was the will of French legislators to avoid the creation of a strict procedural regime for international arbitration. Article 1452 NCPC also applies to international arbitration if French procedural law has been elected either by the parties or by arbitrators to govern arbitration. If no reference has been made, a French judge would probably extend the use of article 1452 NCPC because of the necessity for an arbitral tribunal to accept its mission.

The will of arbitrators to accept their mission must be indubitable. However, no requirement of form has been expressed in the 1980-81 reform. The consent of arbitrators can be tacit. In this case, their acceptance will be obvious with their first action performed during arbitration process. In all situations, the acceptance must be expressed without ambiguity and without doubt³³⁴. The best option for the acceptance would be to require a written acceptance. A written acceptance would facilitate proof of the arbitrators' acceptance of mission. It would also facilitate the resolution of problems related to questions as to whether arbitrators had really accepted their mission.

In the ICC Rules

Under the ICC Rules, arbitrators are said to have accepted their mission once they have notified the parties of their willingness to carry out the arbitration. This is only a provisional acceptance of mission since their appointment must be confirmed by the ICA and their appointment can be challenged by one party, at least. Even if the acceptance of mission is only provisional, it has a certain significance as it is the starting point for the arbitrators' duties which are incumbent on them.

In Scotland

Under Scots law, acceptance of office is really the first step that arbiters should take to initiate the arbitral process. Generally acceptance of office is expressed by means of a signed letter or by means of a formal minute³³⁵ specially dedicated to the purpose. To complete the process of appointment, arbiters have to intimate their

³³⁴Interlocutory order of the 10th May 1990 *European Country hotels v Legrand et autres* unpublished reference 541/90 in the Juris Class. 1991. 17 'La preuve et la date précise à laquelle le troisième arbitre a accepté sa mission, personnellement, sans équivoque ou ambiguïté et à partir de cette acceptation portée à la connaissance des parties.'

³³⁵'In the form of a signed minute which is written on the same sheets with the submission where there is room for it; otherwise on any separate sheet ... care must be taken that the minute is so expressed as to bear evidence in gremio identifying it clearly with the contract of submission to which it applies'. BELL 1877 p178 §328

acceptance of office to both parties, which is usually done by endorsing a minute of acceptance³³⁶.

In the Model Law, the acceptance of mission by arbitrators is not addressed.

Conclusion

The acceptance of office by arbitrators has a considerable significance as to their duties and their liability. Once arbitrators have formally accepted their mission, if necessary, they will be considered as liable for any breach of the duties which are incumbent on them. Acceptance also marks the beginning of the time allowed for the rendering of the final award when the award has to be produced within a definite deadline.

With the acceptance of mission, difficulties may arise with respect to the proof of acceptance given by arbitrators. If no proof of acceptance can be given, difficulties might occur as to defining the starting point of this deadline for rendering the award. Hence a written acceptance of office is advisable.

4 : The duty to render the award within the time limit

Under some legal systems and rules, arbitrators have to render their arbitral award within a certain time limit. Once the time limit is over the authority granted to arbitrators is at an end and their jurisdiction is no longer valid. The enforcement of such a deadline can be really rigorous. Where a time limit exists extreme care must be taken to see that it is complied with. The obvious rationale behind the respect of a time limit is to ensure that arbitrators will speedily render their award without increasing the time spent on the arbitration.

In England

In the past, there was no time limit³³⁷. There is still no specific time set for rendering the award in the 1996 Arbitration Act. Arbitrators are nonetheless required to avoid unnecessary delays³³⁸. Their avoidance is a keynote of the Act. Besides, another incentive to render the award within a reasonable time is indicated, in section 24 § 1, allowing the court to remove arbitrators who fail to use all reasonable despatch

³³⁶WEIR 1979 p38

³³⁷Section 13 of the 1950 Arbitration Act provided that the award could be rendered at any time. However arbitrators should use all reasonable despatch to render the award within a reasonable time. If they fail to do so, then they could be dismissed by the courts at the request of any party without fees payment.

³³⁸Under section 33 of the 1996 Arbitration Act

in conducting the proceedings and making the award³³⁹. If the parties consider that arbitrators are not using all reasonable despatch in making the award, they may agree to revoke their appointment under section 23. It can be said that arbitrators have the duty to render the award within a reasonable time, otherwise they may be removed or their appointment be revoked.

In France

Pursuant to article 1456§1 NCPC, arbitrators are bound to render their final award within 6 months after the acceptance of their mission³⁴⁰. The 6 months deadline starts from the day the last arbitrator has accepted office. The French statute also recognised the parties' freedom in fixing the contractual deadline therefore the legal deadline applies only if the parties did not mention any deadline, in their arbitration agreement³⁴¹. After 6 months for the legal deadline or for a contractual deadline fixed by the parties, the mission of arbitrators comes to an end³⁴².

In the ICC Rules

Pursuant to article 18 of the 1988 Rules and article 24 of the 1998 Rules, arbitrators must render their final award within 6 months running from the date of the signature of the last arbitrator or the last parties to sign the terms of reference. The deadline will usually be extended on a normal basis. It is extremely important that the extension be made before this deadline expires, otherwise the case could be considered as closed. Extensions of time are submitted to the first committee of the ICA of the month, and exceptionally when a member of the first committee is interested to the third committee.

³³⁹ The DAC sets out the limits of this court power; 'we trust that the courts will not allow the first of these matters (i.e. the refusal or failure of an arbitrator to properly conduct the proceedings) to be abused by those intent on disrupting the arbitral process. To this end we have included a provision allowing the tribunal to continue while an application is made. There is also clause 73 which effectively requires a party to put up or shut up if a challenge is to be made.' DAC 1996 Report p27

³⁴⁰ In *European Country Hotel Ltd* case, the arbitration clause had fixed a six months time-limit for the arbitral tribunal to render its award. In dealing with a request for postponing this time-limit, the court deemed that the proof of the final acceptance of the mission by the third arbitrator was not sufficient to consider the time limit as being over. *European Country Hotel Ltd v Legrand et autres*, TGI of Paris, 10th May 1990 in *Juris Class.* 1991. 25.

³⁴¹ *Dame Krebs Veuve Czerefkow v Milton Stern Et Autres*, *Cour de Cassation*, chambre civile 2, 17th November 1976 in *D.*1978. 310 in which the court hold that the deadline of three months set forth by article 1007 of the Code of Civil Procedure is only applied if the parties did not established any contractual deadline.

³⁴² In *Micheli v Marakiano* case, the court specified that the expiration of the contractual deadline fixed in the submission agreement or the legal deadline results right away in the suspension of the mission granted to arbitrator. *Micheli v Marakiano et autres*, Rouen, 5th June 1889 *D.*1891.II. 98.

In practice, it is sometimes difficult to respect this 6 months deadline³⁴³ even if the Secretariat closely follows the calendar of each arbitration³⁴⁴. It has been said that under the 1988 Rules, the ICA lacks precise information to exercise its control³⁴⁵. This criticism is too extreme. Part of the task of the Secretariat is to extend the deadlines, for that the counsel in charge of the case checks the reason for the delay and informs the ICA³⁴⁶. Besides, it has also been said that many arbitrators have 'no regard whatsoever to the 6 months time limit and make no effort to respect it'³⁴⁷. Such a comment is too general. This might only be said when arbitrators do not try their best. Sometimes delays occur due to the parties or their counsel' actions.

With a view to revising the ICC Rules, the Working Party proposed³⁴⁸ that arbitrators present, for the information of the ICA, the timetable which they intend to follow until the end of the proceedings. Such a timetable should facilitate the respect of the 6 months time limit, and the parties and arbitrators should be made conscious of it. Article 18 of the 1998 Rules follows this idea : when drawing up the terms of reference, as soon as possible thereafter, the arbitral tribunal after having consulted the parties shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and communicate it to the ICA and to the parties.

With both the ICC Rules and French legislation, there is a possibility of obtaining an extension of time on the request of the arbitrators to the ICA or on the request of both arbitrators and the parties to the French state courts. In both cases, courts, i-e the ICA³⁴⁹ or French courts, will exercise their discretion after careful examination of the reasons presented.

³⁴³During my internship, delays usually originate from the parties, or they were due to special event such as awaiting for an expertise, or the completion of proceedings before national courts or even the death of one member of an arbitral tribunal.

³⁴⁴For fast track arbitration, keeping the deadline imposed by the parties to render the final award can be quite difficult. If the arbitral tribunal is pressed by time to have the final award scrutinised by the ICA and if there is no session of the ICA during which this can be done, the matter will be dealt by the chairman of the ICA under article 1.3 of the 1988 Rules and 1998 Rules.

³⁴⁵WORKING PARTY Document 420/344 p27 §57.

³⁴⁶During my internship, a great part of my task was to ensure that deadlines either for terms of reference or awards would be extended by the committee of the ICA. For that, I prepared agendas that would be given to the members of the ICA.

³⁴⁷WORKING PARTY Document 420/344 p27§57.

³⁴⁸WORKING PARTY Document 420/344 p27§58.

³⁴⁹WORKING PARTY Document 420/344 p27§57.

In Scotland

For domestic arbitrations, time limits can be imposed by statute³⁵⁰ or by the parties. In both situations, arbiters are under the duty to render their decision within the determined time. But if the time limit is neither specified by the parties nor by statute, the submission is taken to endure for a year and a day³⁵¹ without further action taken by either the parties or the arbiter³⁵². When the submission either states no time limit or leaves that part blank, the contract is said to subsist up to forty years³⁵³.

The Model Law does not contain a specific deadline for rendering the award.

Conclusion

A time limit obliges arbitrators to produce a final award within a reasonable time. This is certainly the rationale behind the legislation establishing a time limit for international arbitration. The other reason for establishing a deadline is to limit the arbitrators' mission to a determined time. On the one hand, such a defined deadline is certainly a good incentive for arbitrators to render a speedy award. But a better incentive for arbitrators to render their award is certainly the possible sanction of not being paid or having a reduced fee if they do not comply with this deadline. On the other hand, fixing the time limit by statute or in the rules could perhaps be questionable with regard to complex cases³⁵⁴. Indeed some disputes can be settled in a shorter time limit whereas others, like international disputes which raise intricate questions, will need extra time. This is the reason why the possibility of extending the time limit is given where a fixed time limit has been established.

³⁵⁰E.g. by the Lands Clause Consolidation (Scotland) Act 1845 sections 30, 35; by the Agricultural Holdings (Scotland) Act 1949 (c75) section 75.1 Schedule 6 § 8 (amended by the Agricultural Holdings (Scotland) 1991 (c55) section 61 Schedule 7.

³⁵¹IRONS AND MELVILLE 1903 p133. See for instance *Earl of Dunmore v M'Inturner* (1829) 7 S 595 'A submission having been prorogated, on the 5th February 1823 to the day of the ... next' and the next prorogation not having been executed till the 6th February 1824, the court refused to sustain a reduction of the decree-arbitral subsequently pronounced, which was brought on the ground that the prorogation ought to have been executed within a year and a day' p595. *Fleming v Wilson & M'Lellan* 5 S 906 'a submission having been entered into without any limitation in point of time and not containing the usual blank clause applicable to the endurance and the parties having, after the expiry of a year, gone on pleading. The court held that the submission did not fall by the lapse of the year - that at any rate the parties had prorogated it by their conduct'.

³⁵²See *Earl of Dunmore v M'Inturner* (1829) 7 S 595 'a submission having been prorogated, on 5th February 1823 to the day of next' and the next prorogation not having been executed till the 6th February 1824, the court refused to sustain a reduction of the decree-arbitral which was brought on the ground that the prorogation ought to have been executed within a year instead of a year and a day'.

³⁵³It is now subsisting up to twenty years in conformity with the Prescription and Limitation (Scotland) Act 1973 (c52) section 7 : 'if after the date when any obligations to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years'. IRONS & MELVILLE 1903 P134.

³⁵⁴DAVID 1985 p268

Part 4 : The duties as to the award

1 : The duty as to the form of the award

The requirement of a written award arises from the New York Convention, which had a great impact on law-making. It is useful to note that article IV.1 of the New York Convention requires a 'duly authenticated original award or a duly certified copy' to obtain enforcement of the award. To obtain the enforcement of an award, a party may only supply the duly authenticated³⁵⁵ original award or a duly certified³⁵⁶ copy, which implies that the award be in a written form.

In England

Section 52 of the 1996 Arbitration Act stipulates that the parties are at liberty to agree on the form of the award, and it shall be in writing. Section 52 § 1 restates an implicit rules of common law that the parties are free to determine the form and content of an award. This is a new requirement of English law. Section 52 § 3 is based on article 31 § 1 of the Model Law and requires that the award be in writing. The present writer believes that oral award will become unusual even if enforceable. Even if in the English tradition, oral awards are legally acceptable, the trend towards harmonisation will probably lead to their disappearance. This view is supported as it has been said that section 52 § 3 also reverses the common law position whereby an oral award was valid although it is unlikely that oral awards are these days ever made³⁵⁷.

The change in the law is remarkable and is welcome. In doing so, the Act adopts the general consensus that arbitral awards should be in written form.

In France

A French award must also be in writing whether it is domestic or international. The requirement of a written award is not expressly mentioned in the text of both decrees but it is unequivocally demanded in the provisions describing the content of arbitral awards (articles 1471 NCPC, 1472 and 1473 NCPC). The written form of the award is also justified by the fact that a judicial decision is never rendered in any other form than written. The principle holds for an international award rendered under French law.

³⁵⁵ An authentication of a document is the formality by which the signature is attested to be genuine. VAN DER BERG 1994 p251

³⁵⁶ The certification of a copy is the formality by which the copy is attested to be a true copy of the original. VAN DER BERG 1994 p251

³⁵⁷ MERKIN R. chapter 21 p88

In the ICC Rules

The ICC Rules do not specify what form an ICC award should have, since there is no specific provision addressing the issue even in the 1998 Rules. Even if this requirement is not expressly stated in the text it is nonetheless unequivocally implied. It has been said that the award should give the appearance by its drafting that justice has been done³⁵⁸ consequently an ICC award is always in writing. The fact that arbitrators submit a draft award to the ICA for scrutiny, that the award be signed by arbitrators, and that the award be notified to the parties and so on, all clearly imply that an ICC award must be in writing.

In Scotland

The general rule requires respect of the form taken by the submission agreement. As Lord Neaves observed³⁵⁹ : 'it is a recognised general rule that according to the nature of the reference may be the nature and form of the award'. The principle has been clearly proven by case law³⁶⁰. If the reference to arbitration is formal and probative, then the arbitral decree must be rendered in a similar form. In conclusion, the arbitral decree should be put into writing.

The form of an international award under the Model Law is also in writing under article 31§1. The written form of an award is a mandatory requirement which conforms with the general tendency of modern arbitration law.

Conclusion

There is a consensus as to the written form of arbitral awards. When drafting the Model Law, such a requirement was considered to be obvious by the Secretariat and by the Working Group³⁶¹. The above study shows that a written award is now generally accepted as noted in the legislation and rules under study as remarked with the drafting of the 1996 Arbitration Act.

³⁵⁸ GRAIG & PARK & PAULSSON 1990 p326

³⁵⁹ *Dukes v Roy* (1869) 7M 357 at 360 in IRONS & MELVILLE 1903 p187§4

³⁶⁰ *Earl of Hopetoun v Scots Mines and Co* (in S.C 18 D 739) in which the submission to an arbiter resident in England contained no provision as to the particular form. The arbiter issued an award in the Scots form which was in conformity with the validity of the law of England. The court held it should take 'cognisance of and interpose its authority to a decree-arbitral contained in such an instrument.'. In *M'Larren v Aikman* (in 1939 SC 222), the court held that where the submission in regard to the valuation of urban heritable subjects, entered into by a formal and probative submission, the award should follow the same formal and probative form.

³⁶¹ HOLTZMANN & NEUHAUS 1989 A/CN.9.207 §86 p844 and first Working Group Report A/CN.9216 § 78 p847

2./ The duty to produce a complete award answering all questions and complete according to the texts under study.

An award must be exhaustive in the sense that it must deal with every matter submitted in the arbitration agreement. Every question referred by the parties must receive an answer in the award.

A Scottish award must be complete³⁶². The failure by arbiters to exhaust the submission is fatal for their award. Lord President Dunedin observed 'if an award does not deal with some matters submitted, then it cannot stand even so far as it does deal with matters submitted, because it has not exhausted the submission.'³⁶³ Even if all matters raised in the submission should be covered in the award, this does not imply that it should introduce extraneous questions³⁶⁴. If it does go beyond the terms of the submission, the award will be said to be *ultra fines compromissi* because arbiters have included matters which should not have been therein because it was not within the scope of the submission. For example, when the submission demanded how much a builder was entitled to be paid for extra work and the arbiter fixed a price for the work which went beyond the terms of the contract, this was going beyond the limit of the question³⁶⁵. The conclusion about the matter is given by Lord Moncrieff³⁶⁶ when an award in a judicial reference is clear in its terms, correct in its form, embracing nothing which was not referred and exhausting all that was referred, it was not competent for the court to review such award on its general merits or to set aside or refuse to give effect to it.

The texts under study follow the principle of Scots law developed above. Arbitrators must answer all questions asked by the parties either given in the arbitration agreement or the terms of reference for an ICC arbitration. When arbitrators fail to complete their mission which consists of deciding the parties' demands, they rule *infra-petita*³⁶⁷. On the one hand, *infra-petita* may happen from a

³⁶²An award should be making no reference to extrinsic document which can be avoided'. BELL 1877 p258

³⁶³*Pollich v Heatley* 1910 SC 469 at 481

³⁶⁴ BELL 1877 p248§474

³⁶⁵In *Napier v Wood* (1844) 7 D 166, the court held that such a decree was *ultra vires* and reducible because the submission was disregarded. Lord President Boyle said 'it is clear that the parties proceeded upon the basis of a complete contract for building the vessel. Now that contract stipulated a particular price and subsequent offer of a *douceur* for the dispatch did not change the contract. Neither did the alteration in the size of the vessel which beyond the contract-price which is clear he must have done from the sum he has given decree for.'

³⁶⁶*Mackenzie v Girvan* (1840) 3 D 318 at 326-331

³⁶⁷To judge *infra petita* is to judge without dealing with every point asked by the parties.

wrong estimation by arbitrators of the scope of their jurisdiction. On the other hand, it may happen when arbitrators do not rule upon one matter, whether it is a deliberate refusal or an omission. With *ultra-petita*³⁶⁸, arbitrators go beyond their mission and beyond the scope of the arbitration clause. Even if they remain within the limits of the arbitration agreement, when they rule upon the demands which were not formulated by the party, they rule *ultra-petita*. If arbitrators do not complete their mission and forget about a single question, they do not cover the scope of their mission. If they consider more questions than asked in the arbitration agreement or in the terms of reference if any, they will have gone too far in their mission.

3./ Duty as to the inclusion of signature of all arbitrators, date and place...

There is a general consensus for arbitral awards to contain the date, the place and the signature of arbitrators.

In England

Section 52 § 3 of the 1996 Arbitration Act based on article 31 § 1 of the Model Law requires that the award be signed by or on behalf of arbitrators or all by those assenting to the award. It also indicates that a majority award needs only to be signed by the majority, i.e. by those assenting. All arbitrators may wish to sign the award even those dissenting, in which case it will be impossible for the parties to discover which of them formed the majority and which of them were dissenting. If the July 1995 Bill required signature by a majority of arbitrators only, the intention in section 52 § 3 is to permit a dissenting arbitrator to sign the award if he wishes so. Such a drafting has been criticised as ‘far from happy’³⁶⁹ because such an award signed by the majority only is not enforceable if the dissenting arbitrator wishes to sign it but has not been given the opportunity to do so.

Section 52§5 requires that the award states the seat of arbitration and the date when the award has been made. This is a new requirement for domestic arbitration. The place of making is not normally indicated in a domestic award, while it is a compulsory requirement for international awards as long as they are to be enforced³⁷⁰.

Section 53 concerns an award made in an arbitration whose seat is in England, Wales or Northern Ireland. Such an award is deemed to be made in England, Wales and Northern Ireland. Thus, the fact that the award may have been signed in a

³⁶⁸To judge *ultra petita* is to adjudge more than asked by the parties

³⁶⁹MERKIN R. chapter 21 p88

³⁷⁰Article V.1 of the New York Convention.

different place, simply because it was sent to an arbitrator who was somewhere else, must be disregarded³⁷¹.

The choice of the date when the award shall be considered as being made will be made either by the parties or by arbitrators. The chosen date should be the one, when the award is signed by arbitrators and especially the last one to sign³⁷².

In France

Under articles 1470 NCPC, 1471 NCPC, 1472 and 1473 NCPC, a French award must include the name of arbitrators, the date of signature, where the award has been rendered in order to establish the jurisdiction of courts for enforcement matters, the names of the parties (whether companies or not), the names of the parties' representatives, the reasoning of the award, the parties' contentions, the defences used by the respective parties and the signature of the award. The information given in the award is required for the control carried out by the enforcement judge who is in charge of checking the validity of the award in comparison with the arbitration agreement.

The content of the arbitral award is expressly described in article 1472 NCPC requiring the name of arbitrators, the date of signature, the place where the arbitral award has actually been rendered (to establish the jurisdiction of the courts which will be in charge of the enforcement decision).

With article 1473 NCPC, French law requires the signature of all arbitrators. However, if an arbitrator disagrees with the others, he is entitled to refuse to sign it. The others should mention the fact and the reasons for which the dissenting arbitrator contests the award. Although an arbitrator dissents the majority award has the same weight as if it had been signed by all arbitrators. All mentions of date, of place and of signature are extremely significant for the validity of the award. Thus arbitrators ought to give the above information under pain of nullity for their award.

In the ICC Rules

For an ICC award, arbitrators ought to make every effort to ensure that the award is enforceable at law. The award should include a number of necessary items : the names and the domiciles of the parties and where applicable of their counsel or other representatives; the names of the arbitrators; a determination of the official place

³⁷¹The award will be considered to have been made at the place where it was signed. This reverses the recent decision of *Hiscox v Outhwaite* [1992] AC 562, where the award was held to have been made in Paris, purely because it was signed there even though the arbitration was taking place in London.

³⁷²Under section 54 of the 1996 Arbitration Act

or seat of the arbitration; a recital of the essential milestones of the proceedings, demonstrating that the parties had adequate opportunity to present their case; the findings of the tribunal as to its arbitral jurisdiction and the reference to the arbitration agreement upon which jurisdiction is based; the determination of the applicable substantive law(s); if the arbitrators exercise the power of *amiable compositeur* ; a reference to the agreement of the parties giving them such a power; reference to the respective claims and defences of the parties and the issues to be determined; a reasoned resolution of the issues contained in the terms of reference; a decision on each of the claims and if applicable, counterclaims and the reasons therefore; a determination of the monetary or other relief to be accorded, including damages, interest, arbitration costs and legal fees if appropriate and signature of the award with the date of such award.

The principal provisions of the ICC³⁷³ governing the making of awards contemplate that all awards should be signed. The particularity of an ICC award lies in its late signature. An ICC award cannot be signed by arbitrators before the ICA has agreed with its content and has adopted it in its draft form. Such a scenario supposes that the ICA verifies that its content matches the points established in the terms of reference. The ICC Rules also address the problem of a majority award. If necessary, the presiding arbitrator can make the award when there is no majority among arbitrators as to the content of the award. In that unique scenario, the presiding arbitrator is entitled to sign the award in reliance on article 19 of the 1988 Rules and article 25 of the 1998 Rules. The presiding arbitrator will be able to sign the award after its verification by the ICA. The revision of the ICC Rules will not change the fact that arbitrators must submit their award in a draft form for approval by the ICA, and only after its approval it will be signed by arbitrators.

In Scotland

As an award is the official decision of arbiters, 'it requires to be duly executed and signed'³⁷⁴ by them. The award should be signed by all arbiters although if one arbiter refuses to sign it, the decree arbitral is still valid. In *Mc Callum v Robertson*³⁷⁵, the court indeed established that principle in holding that a decree-arbitral only signed by two arbiters while five have been selected was still valid and effectual in point of form. As to the place of the making of the award, Scots law does not require its

³⁷³Article 21 and 22 of the 1988 Rules and article 25 of the 1998 Rules

³⁷⁴BELL 1877 p239§449

³⁷⁵*Mc Callum v Robertson* (1825) 4 S 66

express indication in the arbitral decree. It is the same for the date. Scots law does not require that the date be specified. In practice, arbiters always specify it. The Scottish practice can be explained by the fact that a decree arbitral is not considered as final until it has been delivered to the parties by the clerk³⁷⁶.

For an international award under the Model Law, the date, the place of arbitration, the signature of it by the majority of arbitrators should be included³⁷⁷. In pursuance of article 31§3, it is indubitable that the award must state the place of arbitration and that place should be treated as the place of its making. It also requires that the date be indicated. And the date is deemed to be the date of its signature. The Model Law provides that the signature of the award be made on a majority basis in default of the signature of every arbitrator. There is no need for all arbitrators to sign the award : only a majority needs to sign it. If any arbitrator feels unable to sign it, he is not obliged to put his signature if he disagrees with it. But the reasons explaining the absence of his signature must be given.

Conclusion

Most legal systems have a common requirement for arbitrators to sign their awards. There is a difference whether the requirement is of signature of all arbitrators or of a majority of arbitrators. In the first case, it is unequivocally required that all arbitrators should sign their award if it is to be valid. In the second case, the systems under study allow the majority of arbitrators to sign the award. In some legislation, the reason as to why a dissenting arbitrator refuses to sign the award is required.

Most legal systems require mention of the date and the place where the award was issued with the exception only of Scottish domestic law which does not consider them as significant. The reason for this may lie in the fact this is old legislation which did not yet benefit from the evolution of arbitral practice. The other legal systems and rules requiring mention of date, place and signature are extremely severe with its implementation. The indication of date and of place is useful for checking whether or

³⁷⁶ *Johnson v Gill* 1978 SC 74. In that case, the court was asked when the award was considered to be final. The court took the view that an award is final after it has been delivered to the parties by the clerk. The determination of the exact moment when the award is final, depends upon whether the clerk holds the award for the arbiter or for the parties. If the circumstances show that the clerk holds the award for the arbiter, the proceedings cannot be finished and the award can still be changed. If the circumstances show that the clerk holds the award for the parties, the proceedings are held to be finished and the award is final.

³⁷⁷ Under article 31§2 and 3 of the Model Law.

not the award was made within the time limit. The mention of the place has its importance for its execution especially if difficulties arise as to its implementation.

4 ./ The duty to render a reasoned award

The reasons are the legal basis upon which the award is based. Arbitrators may give their reasons and explain why and how they have reached their decision.

In England

There was a long-standing practice that English awards did not contain reasons³⁷⁸. Despite famous authorities recommending against the introduction of reasons in arbitral awards³⁷⁹, English arbitrators have increasingly given their reasons in final awards³⁸⁰. The 1996 Arbitration Act brings a reversal in the law with the introduction of a requirement for reasons in the award. The DAC stated in its July 1995 and February 1996 commentaries on the Arbitration Bill that requiring reasons is in the line with the principle accepted by English law that persons whose legal rights have been affected are entitled to be told why. Section 52§4 states that the reasons must be included in the award unless the parties have agreed to dispense the arbitrators to do so. The DAC required the reasons in the award unless it is an agreed award or if the parties have agreed otherwise.

Such change of attitude stems from the desire to follow international practice. It has also been explained by the fact that there was a growing tendency for English courts to require reasons when reviewing the actions of public bodies which make important and binding decisions affecting parties' rights and obligations. There are two exceptions to the introduction of the reasons in the award. They should not be included in respect of an agreed award³⁸¹. They should not be included if the parties have clearly stated that they do not wish to have them in the award.

In France

It is a general principle of French law that arbitral awards should include the reasons³⁸², otherwise arbitral awards are null. Such a requirement stems from the fact

³⁷⁸ See Merkin for a detailed overview addressing the changes from the old law into the new one. MERKIN R. chapter 21 p89

³⁷⁹ 'Consider what you consider justice requires and decide accordingly. But never give your reasons, for your judgement will be probably right but your reasons will certainly be wrong.' Lord Mansfield quoted by LORD BINGHAM in *Reasons and reasons for reasons : differences between a court judgement and an arbitral award* in *Arb. Int.* 1988. 141

³⁸⁰ The LCIA also demands the statement of reasons in the award (article 16).

³⁸¹ Under section 51 of the 1996 Arbitration Act

³⁸² Under article 1471 NCPC

that arbitrators are bound to follow the rules of judicial procedure and also because arbitral awards are similar in nature to judicial decisions. Therefore the obligation to render reasoned awards is a rule of public policy which must be complied with under pain of nullity³⁸³.

Real difficulties arise with foreign awards. What happens to an award emanating from a legal system where the giving of reasons is not required? Does its validity suffer from the lack of reasons under French law? With a great number of cases tackling this issue, French courts agree to recognise those awards even without them giving the reasons³⁸⁴.

In the ICC Rules

Under the 1988 Rules, there is no provision demanding the inclusion of reasons in awards. In practice, however, the ICA ensures that arbitrators have a suitable reasoning when answering the questions put by the parties. The counsel in charge of the case will carefully consider if there is a reasoning, whether it seems correct when preparing the agenda for the scrutiny of the draft award by the ICA. If the award raises some difficulties, a member of the ICA will be asked to study the award whether it can be approved or not.

In the 1998 Rules, article 25 requires that arbitrators state the reasons upon which the award is based. This provision only aims at clarifying the situation.

In Scotland

In Scots law, the reasons upon which arbiters base their award should not be indicated in the award itself. Scots law believes that the introduction of the reasons

³⁸³Under article 1480 NCPC for domestic award

³⁸⁴Appeal Court of Paris, chambre suppl., 25th March 1983 in Rev. Arb. 1984. 362; *Cour de Cassation*, chambre civile 1, 18th March 1980 *Cam v Cotunav* in JDI 1980. 874 comment Loquin. 'Le défaut de motifs n'est pas en lui même contraire à l'ordre public au sens du droit international privé français, dès lors que le mutisme de la sentence ne dissimule pas une solution de fond incompatible avec l'ordre public ainsi entendu où une atteinte à l'ordre public international' ;

Société Z.O.P et autres v Société F.T.P, Appeal Court of Paris, 1 chambre suppl., 12th March 1987 in D. 1987 IR. 97 's' agissant d'une sentence internationale d'arbitrage, le défaut de motivation doit s'apprécier au regard du 5^{ème} cas d'ouverture prévu par article 1502, c'est à dire si la reconnaissance ou l'exécution sont contraires à l'ordre public. L'absence de motivation ne heurte pas nécessairement l'ordre public international, il n'en n'est pas ainsi quand la procédure d'arbitrage relève d'une loi qui exige l'obligation de motivation. La motivation est donc nécessaire lorsque les parties et les arbitres ont décidé l'application du droit français et de la procédure prévue par le règlement de la CCI et dès lors que le respect des dispositions de l'article 1471 sur l'obligation de motivation de la sentence s'impose aux arbitres.'

into the award is not essential : they are extraneous to the award³⁸⁵. To explain this, Scots law authorises arbiters to give their views in an explanatory note appended to the award.

For an international award, arbitrators under the Model Law should indicate the reasons which their award is based upon unless otherwise specified by the parties. This position is a compromise between the tendency represented by the French reform whereby the reasons must be given³⁸⁶ and the English³⁸⁷ and Scottish position whereby the reasons are not required by statute (at the time of making the Model Law). The reasons must be stated in the award while it allows the parties to waive this provision. The Working Group and the Secretariat emphasised the parties' freedom in accepting that 'it could be inferred from the fact that the type of arbitration envisioned does not usually result in an award with reasons'³⁸⁸.

Conclusion

If there is an obligation to give a reasoned award, it is expressly stated in a provision.

Such a duty stems from the fact that arbitrators are bound to comply with the rules of procedural law. The giving of reasons is one of the essential characteristics of judicial decisions. As giving reasons is usually required for judicial decisions in most countries, it was thought to be the same for arbitral awards.

When legislators want to colour arbitral awards with a certain judicial character, they demand reasoned awards. The obligation to render reasoned awards is usually required in civil law countries while in common law countries it has not always been required. One may say that the giving of reasons is now the rule in international practice and its absence is rather the exception.

With this idea in mind, one may conclude that the giving of reasons in arbitral awards is compulsory and should be done on a routine basis as it is in international practice. And newly drafted legislation usually incorporates the principle in order to be in harmony with general practice, namely the 1996 Arbitration Act and the 1998 Rules.

³⁸⁵All the argumentative process, whether by the parties or by the arbiter, when revolving the subject in his own mind, is essentially of a merely preparatory character and should be excluded from the consummated result viz., the award'. BELL 1877 p259

³⁸⁶Otherwise the award will be null and void.

³⁸⁷Which has changed when the 1996 Arbitration Act entered into force.

³⁸⁸HOLTZMANN & NEUHAUS 1989 p838

5 ./ The duty to deliver the award to the parties according to the texts under study

In England, under section 55 § 1 the parties can either fix by agreement the method by which the awards is to be notified to them. Under section 55 § 2, failing an agreement between the parties, requires the arbitrator to serve a copy on all parties without delay. The award must be notified to the parties by service on them of copies of the award, which should be done without delay after the award is made. Such a duty is a novelty and is non-mandatory in the sense that the parties are at liberty to agree on the requirements as to the notification of the award. Notification has significance with respect to time limits which are linked to the date of the award³⁸⁹.

In France, the delivery of the arbitral award is not among the arbitrators' duties since it is not addressed in the 1980-81 reform.

Under the ICC Rules (article 23 of the 1988 Rules and article 28 of the 1998 Rules), the situation is different. The delivery of an arbitral award is carried out by the Secretariat after the arbitrators' fees and administrative expenses have been fully paid by the parties³⁹⁰. Therefore it is not among the arbitrators' duty to do so.

A Scottish award once completed has to be delivered to the parties either directly or through the clerk. Actual delivery is not mandatory³⁹¹ but it is usual in practice that the award is handed by the arbiter to the clerk with the instruction to deliver it to the parties. The issue of delivering the award to the parties has a particular significance under Scots law. In *Johnson v Gill*³⁹², the court was asked when the award was considered to be final. The court held that actual delivery of the award to the parties is not a prerequisite to the completion of the proceedings, but in some circumstances the termination of the proceedings depends upon whether the clerk holds the award for the arbiter or for the parties. If the circumstances show that the

³⁸⁹Such as the time limits to apply for the correction of the award (section 57), for the challenge of the award and appeals (section 70.3) which in the last resort can be extended by the court.

³⁹⁰The notification of the award is send by DHL abroad, recorded delivery in France.

³⁹¹Actual delivery of decree-arbitral to the parties to the submission is not essential to its completion ; and it is validly issued if signed and, within the period prescribed in the submission for issuing it, put by the arbiter in course of transmission to the clerk for the purpose of being delivered'. IRONS & MELVILLE 1903 p190

³⁹²*Johnson v Gill* 1978 SC 74. The case arises from an agricultural holding. One party asked the arbiter to state the case on certain question of law for the opinion of the Sheriff. The arbiter refused because he said that the award was already in the hands on his clerk to be delivered to the parties. And this action was delayed because the arbiter was waiting for the Secretary of State to fix his remuneration so that the account of expenses could be intimated when the award was issued.

clerk holds the award for the arbiter, the proceedings cannot be finished and the award can still be changed. If the circumstances show that the clerk holds the award for the parties, the proceedings are held to be finished and the award is final.

The Model Law also requires³⁹³ delivery of award to each party according to article 31.4. Delivery is mandatory. Because contradictory proposals had been made concerning registration of awards, deposition of awards with certain courts and their publication, these matters were not addressed by the Model Law.

Conclusion

Some differences exist as to whether the award is directly communicated to the parties by arbitrators themselves or by a third party like an arbitral institution. Communication of the award may initiate the running of a time limit within which a party may request the appropriate court to grant it recourse against arbitrators. The notification of the award can be postponed if the parties have not paid the full costs of the arbitration or the arbitrators' fees.

6./The duty to render a valid award which can be enforced and recognised according to the texts under study

Arbitrators should aim at rendering a valid award which will be easily enforceable and recognisable. A valid award implies that arbitrators have complied with procedural rules throughout arbitral proceedings. Again, a valid award must abide by the mandatory rules of form, content, signature, the delivery if necessary, and arbitrators must answer all questions without omission or without adding any further questions of their own.

For the English Act, the French legislation, the ICC Rules and the Model Law, an enforceable award will be one which abides by the mandatory rules seen above. The Scottish position is well presented in the following statement : 'it should be a delivered instrument ; in the form of a probative writ, unless one holograph by a single arbiter; embodying the arbiter's own proper judgement; commensurate with the submission, so as to determine everything within the submission, and nothing beyond; unambiguous in its language; congruous and self-consistent in its several members; self contained, and neither resting upon notes or any intrinsic document, if it can be avoided; decisive in its findings and decernitures; constituting whatever obligations it means to impose, in such terms that, after the close of the submission, these may be enforced, when necessary, by courts of law, without again recurring to the arbiter;

³⁹³Article 31 of the Model Law

simple and as far as possible, free from reservations or qualifications, which are apt to impair that essential attribute, the conclusive finality of the sentence³⁹⁴.

Part 5 : Miscellaneous duties according to the texts under study

1 ./ The duty to decide the case

Once arbitrators receive their powers by a valid arbitration agreement and the terms of reference have signed and accepted, the duty of arbitrators is to decide the case in accordance with the arbitration agreement. Arbitrators must decide the case, within the limits of the arbitration agreement. Arbitrators must answer all questions of the arbitration agreement and they should not introduce or omit any question. Difficulty may arise with the introduction of new demands by the parties during arbitral proceedings. Whatever happens, it is the arbitrators' duty to decide the case and to give an answer to every questions found in the arbitration agreement. Such a duty is so significant that most legislation considers failure to do so as a cause of nullity of the award³⁹⁵.

2 ./ The duty to be neutral

Neutrality is sometimes required but mostly in international practice. Indeed the arbitrators' neutrality refers to their capacity to keep away from the hot and thorny issues of politics, economics and social or cultural issues. Their neutrality would normally arise from their nationality. If they are of a different nationality from those of parties, their freedom of judgement and their detachment without being directly or indirectly influenced by external pressures and factors can be presumed. This is the ICC position in expecting the sole arbitrator or the chairman of an arbitral tribunal to be of a different nationality from those of the parties³⁹⁶, even if some exceptions to the rule are sometimes found in practice³⁹⁷. The ICA does not prevent the parties from selecting arbitrators of the same nationality, but it would advise against it and the Model Law and French courts follow the same position. In every case, institutions or courts, if necessary, will make every effort to choose neutral arbitrators according to

³⁹⁴ BELL 1877 p261§497 .

³⁹⁵ Model Law article 36(1.a.iii), ICC 1998 Rules article 27, Article 1484.3 and 1502.3 and 1996 Arbitration Act section 68 § 2 § d.

³⁹⁶ Article 2§ 6 of the 1988 ICC Rules and article 9§5 of the 1998 ICC Rules and article 3§3 of the LCIA Rules and article 11 Model Law. The choice of national committee would be done according to the nationalities of the parties, the place of arbitration, the languages of the arbitration and the nature of the dispute.

³⁹⁷ R. SMIT An inside view of the ICC Court in 10 Arb. Int. 1994. 53 and see S. BOND The selection of the ICC arbitrators and the requirement of independence in 4 Arb. Int. 1988. 300

the wish of the parties. After all, the parties are the clients and if they prefer arbitrators of the same nationality this is their responsibility and their choice. The quality of neutrality counteracts the increasing tendency shown by the parties in appointing a person much or even too much in favour of their views. It is understandable that the parties wish to ensure their victory in the case (considering the time and money involved). However this is not fair-play and it could at the end of it be a serious drawback to arbitration.

With the current practice where each party designates its arbitrator while the third one will be appointed by the two others, the neutrality of arbitrators may be disregarded³⁹⁸. These party-appointed arbitrators may be seen as the parties' counsel or the representatives of the parties' views³⁹⁹ (but it is not always true in practice). With such a practice, the limits of neutrality are being reached. However, this kind of appointment by the parties is not always synonymous with the concept of 'partisan-arbitrator'⁴⁰⁰ in the terminology used by R. David. If ever the two arbitrators see themselves as the parties representatives, the third arbitrator or umpire will be in charge of restoring the balance within the arbitral tribunal.

In a case where two arbitrators are nominated, and if a disagreement about the resolution of the case occurs, an umpire (or oversman or chairman depending upon the terminology in use) should be appointed. The umpire will not take part in arbitral proceedings and his intervention within the arbitration process is only justified by the need for a decision. An umpire is then in charge of deciding the matters which have been devolved to him. Nothing more, nothing less. An umpire has to decide the case and render an award. In *Fletamentos Maritimos S.A v Effjohn International*, the court held that the umpire has no jurisdiction to be involved in the determination of the disputes between the parties unless the two arbitrators have disagreed⁴⁰¹. The case shows that the umpire's jurisdiction is limited to the decision of the case when the two arbitrators disagree.

3./ The duty to respect confidentiality during and after the arbitration

Privacy and confidentiality are major assets for arbitration and they are significant advantages in the eyes of those who refer their disputes to arbitration. The

³⁹⁸However the French concept of the arbitrator would be of an arbitrator for everybody who received a jurisdictional mission which implies the respect of impartiality. This is certainly not in accordance with the French concept of an impartial arbitrator. BADINTER in *Petites Affiches* 1991. 4

³⁹⁹See DAVID 1985 p253 § 276. Even the AAA Code of Ethics and the IBA Rules of Ethics insist on respect the non-neutral party-appointed arbitrator of those ethical consideration.

⁴⁰⁰DAVID 1985 p254

⁴⁰¹*Fletamentos Maritimos S.A v Effjohn International* QBD(1995) 1 Lloyd's Rep. 311 at 313 per Mr Justice Tuckey.

parties usually prefer to know that their disputes will be determined out of the 'public gaze'⁴⁰².

Arbitration is seen as private because no one can march into the arbitration room. The parties, their representatives and the arbitrators are the only persons allowed to participate in arbitral proceedings. The right to privacy of arbitral proceedings is usually an implied right for the parties unless they have expressly stated the contrary in their agreement. The public have no right to attend a hearing or arbitral proceedings in general. Arbitrators should ensure that arbitral proceedings are held in private in the sense of that strangers are excluded the parties consent to their presence. The privacy of arbitral proceedings, arbitral meetings and hearings is usually required by most institutional rules⁴⁰³. Some rules and statutes also demand the privacy and the secrecy of the deliberations of arbitral tribunals, for instance in French law⁴⁰⁴. The ICC Rules are quite explicit about the privacy of proceedings as it is expressly mentioned in article 15§4 of the 1988 Rules and article 21§3 of the 1998 Rules. The privacy of arbitral proceedings is also required by other institutions like the LCIA for instance⁴⁰⁵.

Arbitration is confidential because each person (i.e. each party and each arbitrator) is under an obligation to respect a certain secrecy as to the arbitration process, its content. The parties are entitled to have a legitimate expectation of confidentiality. The confidentiality rule is not usually put in writing in legislation but it is expected to be followed in practice. The tradition is that the parties believe that unless a contrary agreement by the parties, the final award will not be made public. If there is a breach of confidentiality it would have a deterrent effect on the parties and it would favour other means of resolving disputes⁴⁰⁶.

⁴⁰² SUTTON D. & KENDALL J. & GILL J. 1997 p9

⁴⁰³ AAA article 21 requires the privacy of hearings and give the power to arbitrators to ask a witness(s) to retire during the testimony of others witnesses. LCIA article 10§4 requires the privacy of all meeting and hearings. ISCID rule 15 chapter 1 : the deliberation of the tribunal shall take place in private and remain secret. Only the members of the tribunal shall take part in its deliberation. no other person shall be admitted unless the tribunal decides otherwise. Netherlands Arbitration Institution article 26 : the arbitral tribunal may allow other persons other than those mentioned in article 21 (counsel) article 29(witness) article 30 and 31 (experts) to attend the hearing unless a party raises objections thereto. ICC 1998 Rules article 21§ 3 The arbitral tribunal shall be in full charge of the proceedings at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted. The work of the International Court of Arbitration is also confidential as emphasised in article 6 of the Statute of the International Court of Arbitration.

⁴⁰⁴ Article 1469 NCPC

⁴⁰⁵ LCIA article 10§4

⁴⁰⁶ See S. BOND's letter as Secretary General of the ICA of Arbitration, answering to Mr Mealey : 'the confidentiality of ICC and most other international arbitration proceedings is one of the

When an arbitration is institutionalised as with the ICC, the confidentiality principle is followed with stringency. The confidentiality of arbitration proceedings is clearly stated in the 1988 and the 1998 Rules⁴⁰⁷. Despite such a strict position, there are exceptions to this principle. Firstly, the staff working at the Secretariat of the ICA and the members of the ICA have access to the circumstances and details of the case and award that they are dealing with⁴⁰⁸. Secondly, the ICC authorises with parsimony the publication of arbitral awards without the parties' names and information which might help discovering their identities⁴⁰⁹. This seems to be contrary to the position whereby the ICC strictly complies with confidentiality. The Secretariat of the ICA nonetheless emphasises the implementation of the confidentiality principle from the very beginning of the arbitration. When notifying arbitrators of their appointment, the Secretariat underlines that their mission implies the utmost respect for the confidential nature of the proceedings. The Secretariat will keep an eye on the arbitrators' behaviour throughout the arbitration to ensure that no violation of this principle occurs. The ICA expects that arbitrators will preserve the confidentiality not only of the arbitrators' deliberations, the communications between arbitrators and the ICC in relation to the scrutiny of award and generally about the content of the arbitration.

In French law, confidentiality does not appear in the legislative text itself but practitioners underline its significance⁴¹⁰ and the case law has imposed its implementation⁴¹¹.

fundamental reasons why sensitive disputes may be resolved through arbitration. If the parties considered that their efforts to resolve a dispute were to become public the likelihood is that in many instances they would refrain from submitting their dispute to arbitration or any other settlement mechanism, thus exacerbating problems related to international trade and investment. The ICC is justifiably proud of the fact that each year it handles hundreds of arbitrations, many of them dealing with sensitive commercial matters, most of which are arbitrated and resolved without even the existence of the arbitration becoming known to the public'. 11 Arb. Int.1995. 274.

⁴⁰⁷ article 15§4 and article 2 of the Internal Rules

⁴⁰⁸ Article 1§3 and article 1§5 of the Internal Rules and Article 6 of the Statute of the ICA. The latter stipulates that the work of the ICA is of confidential nature and must be respected by everyone who participate in that work in whatever capacity. As an intern, I had to sign an affidavit in which I swear that I keep the information secret.

⁴⁰⁹ ICC arbitral awards can be found in the Bulletin of the International Court of Arbitration of the ICC and the 3 volumes book Collection of ICC Awards published by the ICC. Their publication is nonetheless significant for the development of international arbitration law. This should be discouraged. Such type of publication is very useful and helps practitioners

⁴¹⁰ Confidentiality is without doubt, a principle of procedure before the international arbitrator'. DE BOISSESON 1990 at 684 and 'It is the very essence of an arbitration proceeding to ensure the utmost discretion for the settlement of private disputes which the parties had agree upon.' Professor Gaillard states that the principle of confidentiality is known in French law as a supplementary rule which is applied unless the parties agree otherwise. GAILLARD in *Le principe de confidentialité de l'arbitrage commercial international* in D.1987. 153 at 154

⁴¹¹ *Aita v Ojeh*, Appeal Court of Paris, 18th February 1986 in D. 1987. 339 at 340.

Even the Model Law and the 1996 Arbitration Act do not address the issue of confidentiality. During the making of the 1996 Arbitration Act, the DAC investigated the idea of codifying the principle of confidentiality on a firm statutory basis. But it proved controversial and difficult due to the great amount of exceptions and qualifications to the principle⁴¹². The DAC was firmly of the view that the idea to codify the principle was 'far from solving difficulties it would create new ones'⁴¹³. During the Second Reading of the Bill, Lord Roskill suggested that a fourth general principle should be inserted in section 1 of the 1996 Arbitration Act (namely that arbitrations, documents used in them and any resulting awards are confidential⁴¹⁴). But this option was not adopted by the Government after consideration of this issue by the DAC⁴¹⁵.

The principle of confidentiality is usually strictly put into practice by arbitrators. Arbitrators must respect the confidentiality throughout arbitral proceedings but also after their termination. Even when arbitrators are *functus officio* they are, usually, still under the duty to respect the confidentiality of past arbitrations. No names, no facts, no information of any kind should be revealed to the public or to any third parties unless the parties have expressly agreed to it.

The real difficulty arises with respect to the preservation of confidentiality by the parties or their counsel or other persons involved in the course of arbitration like experts and witnesses. These people can be a source of potentially limitless leaks. The case law gives us a number of examples such as *Amco Asia Corp and others v Republic of Indonesia*⁴¹⁶ (this case deals with the problem arising out of the publicity given by a business newspaper about the existence of an arbitration between the parties); *Aita v Ojeh*⁴¹⁷ (the Appeal Court concluded that the previous court had wrongly authorised a public debate about facts which should have been kept secret according to the principle that arbitration must be a private and confidential means of solving dispute); *Dolling-Baker v Merrett*⁴¹⁸ (the English Court of Appeal restrained a party to an arbitration from disclosing, in a later action, documents relating to a previous arbitration), *M v Independent Newspapers*⁴¹⁹ (one of the parties had disclose

⁴¹²Difficulties arose over the myriad of exceptions to these principles. DAC Report 1996 p9

⁴¹³DAC Report 1996 p10

⁴¹⁴MERKIN R. 1997 chapter 21 p6

⁴¹⁵MERKIN R. 1997 chapter 21 p6

⁴¹⁶*Amco Asia Corporation and others v Republic of Indonesia* in ILM 1985. 365.

⁴¹⁷*Aita v Ojeh*, Appeal Court of Paris, 18th February 1986 in D.1987. 339 at 340

⁴¹⁸*Dolling-Baker v Merrett* [1990] 1 WLR 1205

⁴¹⁹*M v Independent Newspapers* [1992] ERNZ 202 .:

sensitive information to a reporter who published a paper about the dispute). Each of these cases directly dealt with the issue of confidentiality at the parties' level. The real issue here is whether or not the parties are bound by a duty of confidentiality as to the disclosure of any information about the arbitration and documents or evidence used or produced in the arbitration.

Until *Esso Australia Resources Ltd v The Honourable S. J. Plowman*⁴²⁰ the principle of confidentiality was long assumed and not really questioned. This case questioned the idea that confidentiality is an essential attribute of the arbitral process. During the course of the arbitration, the Minister announced his intention to release information that had been disclosed during the course of the arbitration. The Minister commenced court proceedings seeking a declaration that he was entitled to act. At first instance, the Minister's application was accepted but went on appeal before the Supreme Court of Victoria. Mr Justice Marks considered that despite the private character of arbitration, the right to privacy did not bring with it a consequential legal or equitable obligation not to disclose to third parties any information at all which may be said to have been obtained by virtue of, or in the course of the arbitration. By majority, the Supreme Court of Victoria concurred with the findings of Mr Justice Marks. The particularity of this case is to rely on the existence of the public interest exception to the duty of confidentiality whereby the public entity might exercise its right to inform the public.

Later, *the Commonwealth of Australia v Cockatoo Dockyard Ptd Ltd*⁴²¹ added fresh worries in the arbitration world. The *Cockatoo Dockyard* case suggested that the public interest may also demand transparency as an exception to confidentiality. In the course of the arbitration, the arbitrator made a series of directions concerning the maintenance of a veil of confidentiality over some documents. The question put before the court was whether this series of directions ordered by the arbitrator was beyond his power. Following the principle developed in the *Australia Esso* case that confidentiality is not an essential attribute of the arbitral process and that the Commonwealth should be able to disclose documents to a state authority on the ground of public interest, Mr Justice Kirby concluded that the arbitrator's orders were

⁴²⁰ *Australia Esso Australia Resources v the Honourable S.J. Plowman* [1994] 1 VR 1.

⁴²¹ *The Commonwealth of Australia v Cockatoo Dockyard Ptd Ltd* 36 NSWLR 662. Following the principle stated in *Australia Esso* case, Kirby says that 'whilst private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the governmental litigant a regime of confidentiality or secrecy which effectively destroys or limit governmental duty to pursue the public interest'. 36 NSWLR 682.

too wide and that the court should give relief. For Mr Justice Kirby, any orders contravening federal or state legislation (such as the free flow of information) and the public legitimate interests must be void because they are beyond the scope of the arbitration. The consequences of this case are manifold. The *Cockatoo dockyard* case is the first application of the *Esso* principles whereby confidentiality is not an essential attribute of arbitration. The *Australia Esso* and the *Cockatoo Dockyard* cases show that Australian courts have given a narrow scope to the confidentiality. Despite an express provision in the arbitration agreement requiring confidentiality to be maintained, it will not make much difference especially when a governmental entity is a party to the arbitration. That entity will be able to use any documents that may have an interest for the public. Therefore the public interest may override the requirement for confidentiality otherwise a party may not receive justice and the public may be deprived of relevant information⁴²². Would the Australian courts' attitude mark the beginning of the end for Australia as a less favoured venue for arbitration ? It seems obvious that any party wishing to enter into an agreement with a governmental entity would certainly try to avoid Australia as an automatic venue for their future arbitration, knowing that any governmental entity would be free to disregard any duty of confidentiality. The attitude of Australian courts may raise some concern. The question is whether other courts will adopt the same stance. If so arbitration will certainly lose since many parties choose arbitration for its confidential character.

In the view of the above, a question should be raised : whether the parties and any person involved in an arbitration such as counsel, experts and witnesses, should be bound by a duty of confidentiality as arbitrators are. It is considered as unrealistic and undesirable to establish an absolute prohibition against unilateral publication of the mere existence of the arbitration, documents and evidence used in an arbitration⁴²³. However, there is a need to establish a general principle of non-disclosure of information or evidence to third parties⁴²⁴. The idea seems interesting but is probably very difficult to implement. If ever implemented such an obligation could have a deterrent effect on potential parties. Since the parties voluntarily refer their dispute to

⁴²²ROGERS A. The Hon. & MILLER D. Non Confidential Arbitration Proceedings in 71 Australian Law Journal 1997. 454 'it is clear that an absolute right to confidentiality has the potential to result in a party to an arbitration not receiving justice. So too can an unfettered or loosely constrained right of disclosure'.

⁴²³J. PAULSSON & N. RAWDING The trouble with confidentiality in ICA Bulletin 1994. 303 at 315 (Hereinafter PAULSSON & RAWDING in ICA Bulletin 1994)

⁴²⁴Even if this idea was unequivocally questioned by the *Esso Australia Resources* and *Cockatoo Dockyard* cases. The idea that an obligation of non disclosure should be put into practice needs to receive more support.

arbitration they could be asked to comply with such an obligation of non-disclosure but nobody nor any institution could really prevent them from disclosing information to third parties if they want to do so. The only possible way to tackle the issue would be to confer a special power on arbitrators to oblige the parties themselves to respect a duty of confidentiality. The solution is obviously extremely delicate or even impossible to be carried out as such. No one can really expect the parties to grant such a coercive power to arbitrators, since it would allow them to oblige parties to abide by the rule. No one can really imagine arbitrators being able to oblige the parties to respect a duty of confidentiality or even sanction them in case of a breach of their duty. The reason for this impossibility lies in three aspects. Firstly, the parties would never grant arbitrators such coercive powers. Secondly, it is certainly not the duty of arbitrators to play the role of the police. Thirdly, arbitrators could not do so as they lack coercive powers.

With respect to the duty of confidentiality, arbitrators can, at the outset of the arbitration, specify that the parties are under a duty of confidentiality and that they are expected to respect it and that they should not disclose information or evidence used in arbitral proceedings. If arbitrators follow this method they cannot be liable for the parties' behaviour. And if a problem occurs the injured party will have grounds to go before national courts and ask for an order demanding the party to stop the disclosure if it is not too late; and if it is too late the injured party will ask for damages.

Conclusion

Most legislation do not codify the principle of confidentiality. This lies in the myriad of exceptions to the principle of confidentiality and the scope of the principle that impedes dramatically the drafting of any provision that would deals with this issue⁴²⁵. For confirmation of the difference in the scope of confidentiality, one may look at the tables established by Dr J. Lew⁴²⁶. He records the various levels of confidentiality imposed on arbitrators and the parties by 32 institutions. The levels of confidentiality required go from no reference being made to confidentiality and the privacy of hearings to an express duty of confidentiality for arbitrators prior to the final award and beyond the final award. The Code of Ethics for arbitrators subscribed to by the AAA states that arbitrators are bound to maintain confidentiality⁴²⁷.

⁴²⁵ DAC Report 1996 p10

⁴²⁶ Table available in 11 Arb. Int. 1995. 292 to 295

⁴²⁷ In canon 6

Given the uncertainty and the confusion that prevails in an attempt to define the scope of a general duty of confidentiality as shown with the cases seen above, it might be wondered whether specific provisions should be included in future legal texts on arbitration (ie. legislation or institutional rules). If any provision were to be drafted, the principle should be codified and a list of the exceptions should be given.

Provisions⁴²⁸ could deal with the respect of confidentiality in relation to the information concerning the data of the arbitration either by the parties, or arbitrators or any third parties involved in the arbitration; the avoidance to disclose documentary or any evidence or pleadings only when legally required ; the deliberations between members of the arbitral tribunal ; the avoidance to disclose the award to a public authority or anyone necessary to establish or protect a right against a third party or enforce an award unless the parties to arbitration previously have agreed. It is true that the drafting of such provisions might not ensure a complete confidentiality. It is probably unrealistic to expect that all breaches of confidentiality can be prevented by these provisions. Their drafting might however help to define the limit of the scope of the duty of confidentiality⁴²⁹.

4./The duty of arbitrators acting as amiable compositeurs according to the texts under study

Under the ICC Rules, the Model Law and the French legislation, arbitrators may act as *amiable compositeur* with the express agreement of the parties. Acting as an *amiable compositeur* implies several duties weighing on the arbitrators' shoulders.

In France, acting as an *amiable compositeur* implies that arbitrators can be motivated by considerations of equity rather than by strict law. They are exempt from the direct implementation of strict legal rules and procedural rules. *Amiable compositeurs* have several duties to comply with. They must obey the rules, whatever they are, established by the parties in their arbitration agreement. They are also

⁴²⁸See the proposed provisions in PAULSSON & RAWDING in ICA Bulletin 1994 at 56 - 59

⁴²⁹My proposed provisions : 1. The parties to arbitration accept to respect the confidentiality of the arbitration they are parties to before, during and after arbitral proceedings in the light of the similar duty of arbitrators whether it is for legal proceedings in a different cases or not. 2. The parties, witnesses, experts accept to sign a document certifying upon their honour that they will comply with the confidentiality of the arbitration at any moment in time. 3. If the parties are compelled to reveal confidential information they should ensure that this is not done at a public hearing in front of a public assembly or before media. 4. No information in relation to an ongoing arbitration should be released on the Internet or any media or publication without having previously obtained the parties' acceptance. If some provisions were to be drawn up, the drafters should include or take into consideration the Paulson and Rawding's suggestions and my provisions.

required⁴³⁰ to abide by the adversarial principle⁴³¹ and the guiding principles⁴³² of litigation set in the NCPC. As to their award, *amiable compositeur* must render a reasoned award⁴³³. The obligation to state reasons is to avoid the rendering of an arbitrary award based on purely arbitrary grounds. Such a necessity to give reasons compels *amiable compositeurs* to stretch their mind and explain the basis of their thinking. *Amiable compositeurs* decide in accordance with equity but they must tell why. These above duties are the ones that an *amiable compositeur* has to abide by in French law. Since French law has a great influence in that particular field, one may suggest that a similar approach may be followed by other rules.

5./ The duty to draw up the terms of reference in the ICC Rules

One of the prime duties of arbitrators under the ICC Rules is to draw up the terms of reference the content of which is listed under article 13§1 of the 1988 Rules and article 18 of the 1998 Rules⁴³⁴.

The terms of reference must be established and signed by the parties and arbitrators or by arbitrators alone⁴³⁵. This document specifies the points at issue that the arbitral tribunal must decide upon. It also determines the procedural rules⁴³⁶ for arbitral proceedings. Again, the document aims at clarifying all points in issue, adapting, modifying or completing the stipulations of the arbitration agreement and

⁴³⁰This duty is strict. Whenever it has not been respected the award will be set aside.

⁴³¹This has been established by statute but has also been emphasised by the French case-law

⁴³²The principles in relation to the object of the dispute, the principles dealing with the proofs, the facts, the right of defence and so on...

⁴³³This has been established by statute but has also been emphasised by the French case law. See ROBERT & MOREAU 1993 p158-159.

⁴³⁴This document shall include the following particulars : 'the full names and description of the parties, the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made, a summary of the parties' respective claims, definition of the issues to be determined, the arbitrator's full name, description and address, the place of arbitration, particulars of the applicable procedural rules and if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositor, such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the ICA or the arbitrator'.

⁴³⁵When the parties to the arbitration are, as often happens, in distant countries, the terms of reference are usually drawn up by arbitrators and then circulated to the parties by letter or by fax for comment. Nowadays, the parties and their lawyers are only called to a meeting when the terms of reference are in almost final state. See J. BEECHEY & A. REDFERN Procedure : Terms of Reference and Provisional Timetable and Fast-track Arbitrations in ICC Conference : *Conference to launch the 1998 ICC Rules of Arbitration* taking place on the 18th September 1997 at the Dorchester, Park Lane, London (Hereinafter ICC CONFERENCE 1998)

⁴³⁶The questions relating to procedure are generally the following : choice of the place of arbitration, the representation of the parties; the communications between the parties, the parties and arbitrators and with the institution; the language of arbitration; deadline for the parties to present their statements of claims ; the powers of the chairman of the arbitral tribunal; the need for a supplementary person or secretary to help arbitrators in handling the administrative aspect of the case ; the administration of proof; partial awards; fees and costs of arbitration.

recording the existing information with respect to the parties⁴³⁷; also at defining the subject matter and subsequent evolution (however the rules do not prevent new issues from being determined to arise or old issues to becoming obsolete at any stage of the arbitral proceedings)⁴³⁸. For the above reasons, the document is essential and should not be avoided by the parties through dilatory tactics⁴³⁹. The present writer believes that it is a fundamental document for an arbitration. It is worth pointing out that this document establishes an inventory of the arbitration itself. Arbitrators should take it into account to produce a complete award. This method adopted by the ICC could be generalised by other legislation or institutions, since it is a means to set up the limits of the arbitration, to establish the powers of arbitrators, the duties of arbitrators and the procedural matters with clarity and severity. The duties of arbitrators with relation to the terms of reference will be to comply with its every point. If arbitrators deal with every point included in the terms of reference, then they will be said to have fulfilled their duty.

6. / The duty to behave appropriately

Little has been written about the arbitrators' behaviour during arbitral proceedings in statutes⁴⁴⁰. No written code deals with this subject, and any attempt would be extremely difficult as it seems quite impossible to consider every possible situation met with in reality.

The present writer believes that arbitrators ought to inform the parties of what is going on during the arbitral process. When arbitrators communicate with a party in writing, they should inform the other party and send a copy to the other party. Arbitrators should not discuss the merits of the case, nor receive any evidence or legal argument from a party in the absence of the other party. If arbitrators discuss a particular aspect of procedure with one party only as to the date of a meeting or deadline for submitting information, the content of the discussion should be made known to the other party as soon as possible. Arbitrators and the parties should refrain from talking about the arbitration itself to strangers and outsiders⁴⁴¹. Compliance with

⁴³⁷As to whether a party is definitely participating in the proceedings for certainty, as to their point of contact where the parties can be contacted and where can they receive their documents emanating from the ICC.

⁴³⁸E. SCHAFER The ICC arbitral process Part II : the terms of reference in the past and at present in ICA Bulletin 1992. 8 at p12

⁴³⁹This document is well accepted by practitioners. See J. BEECHEY & A. REDFERN in ICC CONFERENCE 1998

⁴⁴⁰Some information can be found in HUNTER & PAULSSON A Code of Ethics for Arbitrators in International Commercial Arbitration in 13 Int. Bus. Lawyer 1985. 153

⁴⁴¹The issue relates to confidentiality which was discussed earlier in this chapter.

the duty is essential to the good behaviour of arbitrators. Arbitrators may generally accept any change of procedural rules if both parties agree with that change. Arbitrators should not decide, discuss or receive anything alone without the knowledge of the other members of the arbitral tribunal. These general points presented above seem to the present writer as being important and salient points worth keeping in mind.

A list of behavioural rules to be followed by arbitrators throughout arbitral proceedings is given by Mr Craig and his co-authors : arbitrators communicating with a party in writing should address a copy to the other party and to the other arbitrators; arbitrators should not discuss the merits of the case and receive evidence or legal argument from a party in the absence of the other party and his fellow arbitrators if any; arbitrators may communicate with a party regarding the fixing of procedural dates or other practical and material aspects of arbitration, but the contents of such a communication should immediately be made known to the other party and arbitrators; arbitrators should generally allow the parties to modify or adapt procedural rules including ones that may be reached in the course of proceedings; arbitrators should not discuss the merits of the arbitration with another arbitrator in the absence of the third arbitrator, unless the latter has agreed and is informed of the subject of the discussion⁴⁴². These rules given by famous practitioners and persons often involved in international arbitration practice should be put into practice by any person willing to act as arbitrator. The present writer totally agrees with the above.

In a recent case, the High Court of New Zealand tackled the issue of arbitrators' behaviour and concluded that the use of strong language by arbitrators was wrongful behaviour and amounts to misconduct⁴⁴³. In *Honeybun v Harris*, the arbitrator took the view that the tenant's action was the theft of personal property. Intemperate language was regarded as amounting to misconduct. The case highlights that the boundary line between good behaviour and wrong behaviour is easily crossed. If arbitrators are not careful enough, bad behaviour can easily lead to misconduct and put at risk their award.

7. / The duty for arbiters to appoint a clerk

The delegation by arbiters to a clerk of certain duties is an original feature of Scots law. The appointment of a clerk is not compulsory, but it is however highly advisable and is a privilege for laymen acting as arbiters to appoint a clerk who will be in charge of the legal aspects of the arbitration proceedings. It has been argued that

⁴⁴²CRAIG & PARK & PAULSSON 1990 p240

⁴⁴³*Honeybun v Harris* [1995] NZLR 64 per Penlington J. at 73

the clerk's appointment is dependent on the pleasure of arbiters and has nothing to do with a duty⁴⁴⁴, but the present writer believes that the discretion could be seen as a duty if the parties to arbitration have required that the arbiter appoints a clerk.

When architects or accountants or engineers are appointed as arbiters, one cannot expect them to have the necessary expertise in arbitration law. In this sense, laymen acting as arbiters have the duty to nominate a clerk who is usually a solicitor who will advise them on the procedures to follow. In practice, a clerk has the function of the custodian of the procedure⁴⁴⁵. The relationship between arbiters and clerks is usually seen as a relationship between employer and employee. The contract between arbiters and clerks is a contract of service whereby a clerk performs a duty in return of a fee. Arbiters are fully responsible for the clerk. In pursuing their duty, arbiters must ensure that their clerk receives remuneration. For that purpose, an award may contain express reference to the clerk's remuneration.

Part 6 : Conclusion of chapter 2

Both the duties of independence and / or impartiality are required but sometimes either independence or impartiality has to be complied with by arbitrators as happens in the 1996 Arbitration Act and the ICC Rules.

As arbitrators are required to be and remain independent and / or impartial, any prospective arbitrator who has knowledge of a personal cause of disqualification and any reason for their potential impingement must inform the parties and the institutional body as soon as possible. There is a consensus to request arbitrators to disclose it so as to avoid future challenge.

Both the duty to take care and the duty to proceed diligently are originally found in English law but it can be said that they are implicitly required by other legal systems and rules.

⁴⁴⁴ Among other authorities refer to M. WEIR in ARBITRATION SEMINAR 1990.

⁴⁴⁵ His main duties are the custody of documents, the reception and the dispatching of the communications between arbiter and the parties. He is also responsible for the respect of every procedural step of arbitral proceedings. He must ensure that every documents have the date of lodging and be recorded in an inventory. Every action, every order required or pronounced by the arbiter should be recorded by the clerk. The clerk is also the link between the parties and arbiter as it is his duty to communicate with the parties, to give notice of every order issued by arbiter, arrange dates and venues for hearings and so on. The clerk should also advise the arbiter with respect to the procedural difficulties met in the course of arbitration as the clerk is the adviser of arbiter. The clerk is also responsible for the compliance to the rules involved in arbitration.

Both the duty to respect the '*principe du contradictoire*' and the duty to provide the parties with a fair trial have the same essence. They imply that the parties' right must be complied with during an arbitration so that the parties be equally and fairly treated.

The acceptance of the mission may be sometimes a stringent duty i.e. in France and in Scotland whereas in others it is not. Its acceptance may nonetheless mark the beginning for the duties and liability of arbitrators.

The duty to render the award within the time limit is a safeguard for the parties.

The duty to be neutral is not expressly required in the texts under study, but being neutral for arbitrators should be a duty worth insisting upon.

As to the duty of confidentiality, arbitrators are asked to abide by the confidentiality during and after the arbitration. Such a duty is not expressly stated in the texts under study but it is expected to be complied with in practice.

To recap, arbitrators have the following duties : ethical duties which relate to independence, impartiality, neutrality, proper behaviour and confidentiality; procedural duties which ensures the good process of arbitration in accordance with the rules of natural justice; award duties which ensures the enforceability and recognition of the final award; and some duties whose breach amounts to misconduct for arbitrators.

The existence of these duties ensures the good functioning of the arbitral process, the fair treatment of the parties to arbitration, the enforceability and the recognition of the final award. The goals could not be solely achieved by the powers granted to arbitrators by the parties or by legislation. The aim of the duties is twofold : limit the arbitrators' powers which could be abused and provide guidelines and directions as to the conduct of arbitrators throughout the arbitration and the conduct of the arbitral process.

Powers and duties should work to a balance to push the arbitration in the direction of a successful resolution of the parties' disputes referred to arbitration.

Some duties are considered in a very general character. Various efforts have been made to articulate duties by the elaboration of codes of conduct. But the difficulty of elaborating such a code is a daunting task⁴⁴⁶ as nearly every aspect of the arbitral process, and the arbitrators' behaviour during an arbitration may be potentially relevant. In a view to elaborating a code, it would be impossible to contemplate the extraordinary variety and diversity of factual circumstances encountered in all legal systems and cultural environments. Nonetheless, there are a number of duties that appear to enjoy wide acceptance at an international level; these duties can be generally listed in legislation and rules. Others may be characterised by uncertainties and difficulties; these may not even be listed in legislation and rules but they will be implicitly implemented in practice. Then these duties are not the subject of explicit international rules or legislation. As a result, arbitrators are sometimes left to find their own way in assessing and interpreting the content of a duty and how to implement it. Consequently there is sometimes little guidance available. The only source of information is the past practice which is found in the publications of cases. This underlines the unique role to be played by arbitration journals and the publication of cases by institutions.

The purpose of this chapter is to propose a list of duties as complete as possible. All duties presented above have their importance. All duties are equally fundamental to the good functioning of the arbitral process and the enforcement and recognition of the final award by the parties to arbitration.

In this chapter the duties of arbitrators have been investigated. When one or more duties cannot be fulfilled or when powers are not sufficient, the arbitral process is deadlocked. At this point, national courts may intervene to resolve the difficulties arise before, during and after the arbitration. National court intervention is described in the following chapters.

⁴⁴⁶E. SCHWARTZ The rights and duties of ICC arbitrations in THE STATUS OF ARBITRATOR Special Supplement ICA Bulletin 1995. 67 at 68 (Hereinafter SCHWARTZ in STATUS 1995)

Title three : Relationships between national courts or institutional body and arbitration

The following chapters will deal with the relationships between state courts and arbitration in the light of the legal systems and rules under study.

Whether of domestic or of international origin, arbitration is closely linked to state jurisdiction. In the first chapter, the intervention of state courts before the appointment of arbitrators will be considered. The second chapter will deal with court intervention during arbitration proceedings. The last chapter will address court intervention after the rendering of final awards.

Before moving to the heart of the matter, a quick review of the legal basis appears helpful for a better understanding of these chapters.

The 1996 English Act proposes minimum intervention of national courts into arbitration but above all a user-friendly type of intervention with a view to supporting arbitration rather than interfering with it¹. An important remark should be made : the non intervention policy relates only to Part I, therefore it should be concluded that it does not apply to the Part II of the Act which tackles consumer arbitration agreements.

The French legislation enacted in 1980 and 1981 envisaged the assistance of French courts to an arbitral process whether of domestic or of international nature. Both decrees list when national courts will intervene. They² may intervene at the outset and during arbitral proceedings or finally after the rendering of final awards.

As explained in the Internal Rules, the ICA directly intervenes at every stage of the arbitration governed by the ICC Rules.

The Model Law spells out the state courts' intervention in article 5³. Ten interventions are envisaged at the outset, during and after the completion of the arbitration process. In adopting the Model Law, countries may follow its pattern of intervention or may alter it and select other types of intervention. The purpose of

¹It is modelled on article 5 of the Model Law. Section 1§c of the 1996 Arbitration Act stipulates that 'in matters governed by this part the court should not intervene except as provided for in this part'. The Act follows the spirit of the Model Law in restricting the circumstances in which the court may intervene in arbitration.

²Either the President of the TGI or the President of the TC.

³Stipulating that 'in matters governed by this law, no court shall intervene except where so provided in this law'. The term 'intervention' includes assistance from state courts.

article 5 is to compel adopting countries to list the instances where judicial intervention is appropriate.

Chapter 1 : Relationships between national courts or institutional body and arbitration before the constitution of arbitral tribunals.

The constitution of arbitral tribunals may encounter difficulties. In *ad hoc* arbitrations, arbitration clauses are often unclear as to what procedure should be followed. The second set of cases arises when interim measures are urgently needed before the constitution of arbitral tribunals is completed. The third set of situations arises when a party refers the dispute to national courts rather than to arbitration despite a valid arbitration agreement, while the other party wants to refer the dispute to arbitration⁴.

Part 1 : The appointment of arbitrators by national courts or an institutional body

The appointment of arbitrators by national courts may occur when the parties have failed to appoint by deliberately refusing to act, by using dilatory tactics, or when the appointing procedure is incomplete or unsuitable.

1./ The appointment of arbitrators by an institutional body

If there is a proper arbitration clause, national courts will not intervene in an ICC arbitration. Where the parties have opted for an ICC arbitration, one of the benefits is that the national court's intervention is superseded. Appointment by an institutional body implies its assistance and may imply in certain cases the intervention of a third party, for instance the ICC National Committees.

The appointment of arbitrators under the ICC Rules

The parties are free to agree upon the persons to be arbitrators. Each party should nominate its own arbitrator and the ICA may confirm the proposed arbitrator's name or refuse to do so. A sole arbitrator may be nominated by the parties and then confirmed by the ICA, or if the parties fail to nominate someone, the ICA would

⁴Under Scottish procedure, if a party goes to the Court of Session to obtain the payments of a sum of money, this party will be given power to arrest that sum in security. And if a party has an arbitration clause which is valid, but the party wishes to bring an action before the Scottish court to get the court to arrest that sum of money, then the party can do that. And if the party wishes to stop the proceedings before the Scottish court and initiate an arbitration, the party can do it.

appoint after a proposal from a National Committee⁵. The same process would apply for appointment of the chairman⁶. The participation of a National Committee normally arises when the parties have been unable to agree upon the person who should act as the arbitrator or when their nomination is not accepted by the ICA. Confirmation⁷ will be granted if the prospective arbitrator complies with the criteria of independence, of nationality, of experience in handling cases of great magnitude and so on. Failing an appointment by the parties, the ICC will deal with it.

The originality of the ICC approach is the participation of National Committees. Upon proposal from the Secretariat, the ICA chooses which National Committee should propose a candidate on the basis of the nationalities of the parties, the nature of the dispute, the language of the arbitration, the law applicable to the arbitration, the required knowledge if any and the parties' wishes if expressed⁸. Once the National Committee has been selected, the Secretariat asks it to propose a name from the country in which it is based after having furnished the relevant information about the case⁹. The National Committee should propose a name keeping in mind the requirement of independence for any potential candidate. The ICA is free to accept the National Committee's proposal or to disregard it, if it feels that the proposed arbitrator may lack independence, ability, or the experience to preside over the arbitration in the light of the relevant information about the case¹⁰. If the ICA is satisfied then the proposed arbitrator will be formally appointed at the next session.

The method is totally original. National Committees intervene in the appointment procedure when the ICA needs a name for sole arbitrators, when the parties have failed to propose a name or when the prospective arbitrator is not confirmed by the ICA. Under normal circumstances, the ICA does not directly choose

⁵Under article 2§5 of the 1988 Rules, and article 8§4 of the 1998 Rules

⁶Under article 2§4 of the 1988 Rules and article 8§3 of the 1998 Rules.

⁷If an arbitrator is nominated by a party or by the co-arbitrators for the chairman, he will be confirmed by the ICA. If he is nominated by a National Committee or by direct appointment by the ICA, the ICA appoints the arbitrator.

⁸Under article 2§4 and 2§6 of the 1988 Rules, and article 9 of the 1998 Rules.

⁹Information such as the parties' wishes, the special qualification needed, the nature of the dispute, the law applicable to the arbitration, the identities of the parties, the amount in money involved in the dispute and the place of arbitrations in order to identify the best candidate.

¹⁰In very special circumstances, National Committee may not be asked to propose a potential arbitrator, because the ICA wants to avoid the recourse to a National Committee because the ICA is unhappy with its previous performance, or because it is a fast-track arbitration and the time scale does not allow the recourse to a National Committee, or because there is no National Committee in the country where the prospective arbitrator should be from. Recourse to a National Committee is within the Rules and the ICA does not wish to depart from the Rules, so it is the rule, no recourse to a National Committee is the exception.

the prospective arbitrator since the name should be proposed by a National Committee. The ICA would directly¹¹ appoint a sole arbitrator or the chairman only if there is no National Committee in that country¹².

The ICC procedure has been criticised¹³. The first reason relates to the 'uneven quality in arbitrators appointed' depending on the experience and expertise of National Committees. The criticism is overcome by the ICA's tendency to select National Committees which have given satisfactory names. Besides, the Secretary General requests that the agenda presented to the ICA specifies the relevant expertise and the necessary experience for the proposed arbitrators that qualify them to preside over a particular arbitration¹⁴. In the end, the ICA is able to reject an unsatisfactory proposal in order to conform with the standard of excellence that it is pursuing.

The writer believes that a criticism can be made because of the delays occurring at National Committees' level. The ICA may encounter real problems with some National Committees which consistently propose the name of a candidate whose previous performance was not convincing¹⁵. The Secretary General would try to contact the National Committee to obtain another suitable name, and if this is unsuccessful, the result would be that the ICA cannot confirm the arbitrator. In the end, another National Committee would be asked to propose a name. This kind of situation shows how the ICA's work can be undermined by the action of a National Committee. The ICA should be able to avoid choosing a National Committee whose work is not good enough without having to beg it to change its proposal and lose precious time.

The second type of criticism relates to delays in constituting the arbitral tribunal due to the two-step procedure involving the intervention of two bodies¹⁶. Delays are usually caused by the search for the right candidate at the National Committee's level,

¹¹Provided that neither parties object within the time limit fixed by the ICA, under article 2§6 of the 1988 ICC Rules and article 8§4 of the 1998 Rules.

¹²In 1997 the ICC had National Committee in 71 countries and had direct members in 70 countries and territories in which no National Committee had yet been formed.

¹³R. SMIT An inside view of the ICC Court in 10 Arb. Int. 1994. 53 and WORKING PARTY Document 420/434 p9-10

¹⁴These issues are discussed between members of the Secretariat and the Secretary General during weekly staff meetings.

¹⁵Sometimes, dealing with a National Committee might be a bit difficult. During my internship, I attended sessions during which situations were discussed where the ICA was having problems with a particular National Committee which constantly proposed the name of an arbitrator whose work was not convincing and the work he produced was of rather low quality. The ICA asked this National Committee several times to propose another name but it refused. At the end the ICA did not confirm the proposed arbitrator and the ICA required another National Committee to propose a name.

¹⁶The Committee of the ICA, a National Committee and the ICA again.

by the compliance with time limits¹⁷, by the compliance with the requirement of independence¹⁸ and finally by the number of ICA sessions needed for the arbitrators' appointment¹⁹. It has been proven that an accelerated process is possible in cases of fast track arbitrations because time limits can be shortened by the pursuant to article 32 of the 1998 Rules²⁰.

To accelerate its process, the current chairman of the ICA asks the Secretariat to propose the National Committee which should be called upon by the ICA at an early stage e.g. when the case is set in motion, if it appears that the parties will not nominate the arbitrators²¹. In order to constitute arbitral tribunals, within a shorter time than under the 1988 Rules, the Secretary General could confirm arbitrators²². This delegation of extensive jurisdiction would reduce delays and costs and time would be saved²³. Working Parties also suggest that they should constitute in their country a pool of homologated arbitrators chosen in respect of their qualifications, specialities, their knowledge of different languages, their experience²⁴ etc. The Secretary General would then select from that pool the arbitrators needed for the case in question.

With the entering into force of the 1998 Rules, the confirmation of the arbitrators' appointment will be made by the Secretary General as a rule. Pursuant to article 9§2 of the 1998 Rules, the Secretary General may confirm co-arbitrators, sole arbitrators and chairmen of arbitral tribunals and persons nominated by the parties or pursuant to their particular agreements, provided that they filed a statement of

¹⁷ Article 10 of the Internal Rules

¹⁸ Before the confirmation of any arbitrator, the ICA will verify that the prospective arbitrator has complied with the required independence.

¹⁹ At the best : one court session is needed for the selection of the National Committee, one court session is needed for the appointment and in between a certain lapse of time is needed for the National Committee to propose a name, and time is needed for the candidate to send his CV and statement of independence. If he submits a qualified statement of independence a further time is needed for the parties to express their view.

²⁰ B. DAVIS *Fast-Track Arbitration and Fast-Tracking your Arbitration* in 9 *Journal Int. Arb.* 1992. 43 and B. DAVIS & O. LAGACE GLAIN & M. VOLKOVITSCH *When Doctrines Meet : Fast-Track Arbitration and the ICC Experience* in 10 *Journal Int. Arb.* 1993. 69 J. BEECHEY & A. REDFERN *Procedure : Terms of Reference and Provisional Timetable, and Fast-Track Arbitrations* in 1998 ICC CONFERENCE

²¹ During my internship, I attended session of the ICA. Several times, the chairman Dr Briner asked the counsel in charge of the case to come to the ICA session with a precise idea of which National Committee should be chosen by the members of the ICA when the case is set in motion, rather than going back to the ICA at a latter stage.

²² WORKING PARTY Document 420/344 p12. This is the proposed solution for the 1998 Rules in its article 9.

²³ It would allow a reduction of time because the number of court sessions would be reduced.

²⁴ WORKING PARTY Document 420/344 p14

independence without qualification or a qualified statement that has not given rise to objections by the parties. Such confirmation shall be reported to the ICA at its next session. If the Secretary General considers that an arbitrator should not be confirmed, the matter shall be submitted to the ICA. Hence, one step will be avoided, and this should reduce the time necessary for the confirmation of arbitrators. The two-step procedure would be respected but improved.

The specificity of the ICC method whereby arbitrators are firstly appointed and then confirmed by the ICA would be safeguarded. Along with the ideas developed by the Working Parties, the 1998 Rules would allow a better time management, and a better use of National Committees²⁵ without the current delays encountered with the 1988 Rules.

2./ The appointment of arbitrators by national courts

When the parties have opted for an *ad hoc* arbitration, and if the arbitration clause is uncompleted or does not specify a procedure for the appointment of arbitrators, national courts may assist in the constitution of arbitral tribunals.

The appointment of arbitrators in England

Under the 1996 Arbitration Act, section 18 provides a procedure for appointing arbitrators by national courts in event of the parties' failure to do so assuming that the process set forth by section 17 has not been operated. Section 17 encompasses the situation where one party refuses or fails to appoint an arbitrator within the time specified and the other party is left with the possibility of obtaining the appointment of his nominee as sole arbitrator²⁶. Section 18 stipulates that, if the parties fail to agree what is to happen in the event of a failure of the procedure for the appointment of arbitrators, the court may intervene to appoint an arbitrator upon the request of a party.

²⁵Article 8 and 9 of the 1998 Rules

²⁶To have the sole arbitrator appointed, the party, having duly appointed his arbitrator, may give notice in writing to the party in default informing that the already appointed arbitrator shall be acting as a sole arbitrator. If the defaulting party does not act within seven clear days, the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties. The law established under section 17 of the 1996 Arbitration Act is a novelty in many respects. The novelty is found in the second type of situation, that is when the party refuses to make the appointment. The introduction of this alternative is a major asset, as it aims at fighting against dilatory parties. Similarly, the defaulting party must not only make the appointment within the time specified but it must also notify the other party that it had done so. The clarification of the dual duty for the defaulting party to act and notify is welcome and specifies the that the appointment of the missing arbitrator is incomplete unless the other party has been notified.

The court is granted special powers, listed in paragraph 3, to make good the deficiency of the parties. But the 1996 Arbitration Act does not specify how the court's discretion is to be exercised although under section 19 the court is required to take into account any agreement by the parties as to the arbitrators' qualifications, any failure by the applicant to apply with reasonable diligence and the need to ensure a fair hearing with the minimum of expenses or delay. If the court's powers were previously limited, the court has now greater flexibility and greater scope. It will intervene to the extent that any agreement between the parties does not cover the situation in question. The court has the power to give directions as to the making of any necessary appointment. The power is said to be useful because the court could direct one of the parties to initiate some process for making an appointment or to make an appointment which it had failed to make so far. This is a sort of last chance for the defaulting party to act on its own, before the court does it. The court has the power to direct that the tribunal shall be constituted by appointments already made. This will occur when the already appointed arbitrators have failed to appoint a third arbitrator or an umpire. The court has the power to revoke any appointment already made. Such a power was introduced to allow the court to redress the balance when one party had been imposed an arbitrator chosen by a third party whereas the other party chose his own. And the court has the power to make the necessary appointment itself. In doing so the court should take into consideration any agreement of the parties as to the required qualifications of arbitrators, as set forth in section 19.

The 1996 Arbitration Act simply establishes that the court may assist with the appointment of arbitrators. No indication is given as to the method to be followed, or as to the initial period that the demanding party has to wait before being able to request the court's assistance. The fact that no time limit has been imposed by the Act is certainly due to this practice : if a party A writes to ask for party B to appoint its arbitrator and grants 40 days, the court usually considers that deadline as the basis²⁷. If party B does not answer, the court will intervene in the arbitration process after the 40 days period has elapsed. Such a practice favours the parties' freedom to choose a deadline as long as it is reasonable. However, the court shall take into consideration the qualifications required of arbitrators by the parties. It remains to be seen in practice how the new method of appointing arbitrators really works and if the missing specifications in the Act are not damaging.

²⁷A Scottish court would follow the same rationale.

The appointment of arbitrators in France

France has dual legislation for domestic and international arbitration which influences the state courts' intervention before the arbitration process has been initiated.

For domestic arbitrations, the 1980 decree provides for the assistance of judges, when the constitution of an arbitral tribunal is meeting with difficulties and when the arbitral tribunal is only composed of an even number of arbitrators²⁸. Article 1444 NCPC stipulates : if after the dispute has arisen, the constitution of the arbitral tribunal encounters a difficulty due to the acts of one of the parties or with respect to the functioning of the arbitrators' appointment, the TGI shall appoint the arbitrator(s)²⁹.

According to article 1457 NCPC, the judge's assistance can be demanded by one party. There is no need for both parties to agree beforehand with a view to requesting the judge's help.

The condition for the judge's assistance lies in the existence of a difficulty faced by the parties. This difficulty must have already arisen when they require his intervention. This is a legal requirement which has been reaffirmed in case law³⁰. The TGI will check whether or not it has been asked to assist the parties. Unless the parties have agreed to ask for its intervention, the TGI will not help³¹. If not, it will refuse to assist them because it would be beyond its jurisdiction. The second step consists of ascertaining the validity of the arbitration agreement (whether it is null) and that the clause is adequate for the purpose of constituting the arbitral tribunal.

The assistance of the TGI is even more necessary for *ad hoc* arbitrations. It is quite certain that legislators also envisaged *ad hoc* arbitrations when drafting article 1444 NCPC. *Ad hoc* arbitrations more commonly encounter difficulties as arbitration clauses are usually put in too broad terms. Nevertheless, it is not uncommon for the parties to institutional arbitrations to refer their difficulties to a national judge. In these circumstances, the TGI will be asked as a last resort to resolve these problems.

²⁸The judge can either be the President of the TGI or the President of Tribunal de Commerce (TC) if the agreement expressly provides so. Under article 1454 NCPC, the president of the TGI may complete the arbitral tribunal by appointing the third arbitrator when only two arbitrators have been designated by the parties. An overview of the decisions, given on the basis of article 1444 NCPC, shows a case law essentially emanating from the President of the TGI of Paris.

²⁹The president of the TGI has the power to act. He will try the case in chambers as a '*juge des référés*'. When a delicate and urgent situation occurs the judge may render an interim order without any delay. The judge is empowered to order certain interim provisions and conservatory measures under the Code Civil. He is seized by a writ which should be left with the Clerk's office.

³⁰*SICCA v SETEC Batiment* interlocutory order of the TGI of Paris of the 16th January 1985 in Rev. Arb.1985. 97 and *CRCAM De La Mayenne v Via Assurance Vie* interlocutory order of the TGI of Paris of the 8th February 1985 in Rev. Arb.1985. 99

³¹In comparison, in England and in Scotland, the courts would help even if the parties do not ask for it.

In the event of an international arbitration in difficulty, the TGI will also rescue the arbitral process. Article 1493 NCPC stipulates that 'if any difficulty arises in the constitution of the arbitral tribunal with respect to an arbitration taking place in France, or to one for which the parties have agreed that French procedural law should apply, either party may, in the absence of a clause to the contrary, apply to the TGI of Paris in the manner set forth in article 1457 NCPC'. The judge's assistance can be demanded by either party to arbitration (*la partie la plus diligente* in the French version).

Some differences nonetheless appear in comparison with article 1444 NCPC dedicated to domestic arbitration. Firstly, article 1493§2 NCPC precludes the intervention of any other courts. The Parisian judge is the only judge able to intervene in international arbitrations. Secondly, his intervention is conditional upon the existence of a contact between the international arbitration in question and France, i.e. either arbitrations taking place in France or those for which the parties have agreed that French procedural law would apply³². Thus, his intervention is subordinated to the existence of a territorial contact with France. The limitation put to the judge's intervention is wise. One cannot expect a judge to assist any arbitration without any special close link with the French legal system³³. Before the enactment of the decree, the case-law took the same view.

In *Stern v Air Afrique*³⁴, the judge refused to help the parties because there was no link with French law³⁵ as the original contract was concluded in Gabon and was performed under the law of Gabon. Moreover, there was no reference made by the parties to French procedural law either in determining the seat of the arbitration, or by selecting a single law applicable to the merits of the case or to its procedure³⁶. Even if both parties are French nationals³⁷, ordinary submission to the jurisdiction of French courts does not apply when arbitration is not taking place in France or if French procedural law does not apply to the arbitration. The direct consequence is that the judge may refuse to help the parties. It is important to consider why this link is

³² Article 1493 §2 NCPC

³³ P. FOUCARD L'arbitrage international après le décret du 12 mai 1981 in JDI 1982. 374 at 387 also LEVEL & MEZGER in Rev. Crit. DIP 1981. 623

³⁴ *Stern v Air Afrique* interlocutory order of the TGI of the 2nd April 1981 in Rev. Arb. 1983. 191 comment Foucard.

³⁵ 'Aucun élément de rattachement à la loi française' *Stern v Air Afrique* interlocutory order of the TGI of the 2nd April 1981 in Rev. Arb. 1983. 191 comment Foucard

³⁶ *Stern v Air Afrique* interlocutory order of the TGI of the 2nd April 1981 in Rev. Arb. 1983. 191 comment Foucard

³⁷ In *Stern v Air Afrique*, one of the parties was French.

necessary. A problem may arise when checking the reality of the territorial contact between the arbitration and France, since the judge's assistance is usually asked at the very beginning of an arbitral process. In such a situation, the judge should look for a certitude that this future arbitration will take place in France. The site where the arbitration is supposed to take place is supposedly enough to ensure his intervention. Even if the situs of an arbitration does not impose the submission of the arbitration to the French legal system, such a situs creates a sufficient connection to French law for a French judge to assist the parties in constituting their arbitral tribunal.

It is not compulsory for the parties to refer their difficulties to national courts if they do not wish to do so. In fact, the TGI's intervention is not imperative or exclusive. For international arbitration, the parties are at liberty to prefer the assistance of a third party rather than of a national judge.

The procedure to follow, either in domestic or in international arbitration, is stated in article 1457 NCPC³⁸. The TGI will be seized as in urgent proceedings. An adversarial hearing will take place if both parties have required its intervention. The right of arbitrators to request its intervention has also been recognised in practice. This sometimes happens in practice when both parties do not participate to the arbitral process. The decision of the TGI cannot be appealed³⁹.

In addition, it can be said that the TGI intervenes with the object of assisting arbitral process. It is a temporary and selective intervention aimed at preventing the paralysis of arbitral proceedings.

After ten years of practice, it was concluded that French legislation has been fully tested. It appears that the technical aid given by the TGI initially provided by the 1980-81 legislation is, in practice, slightly different. The sole purpose of its intervention is to solve difficulties in constituting the arbitral tribunal and to facilitate their constitution. Nothing else should be done.

Sometimes, the parties may have the tendency to refer to the TGI for other kinds of reasons, not always related to the constitution of arbitral tribunals, and they may also try to abuse its help. In order to respect the rationale of article 1493 NCPC, the

³⁸It fixes the rules of procedure and the territorial jurisdiction for the situation set forth in articles 1444 NCPC, 1454 NCPC, 1456 NCPC and 1463 NCPC. For international arbitration, article 1493§4 NCPC also refers to article 1457 NCPC.

³⁹Article 1457 NCPC is very clear on the point. The principle has been reaffirmed in case law. When Philip Brothers company appealed to the *Cour de Cassation* the latter declared that appeal against the President's decision is inadmissible. *Société Philip Brothers v Société Drexel et autres*, *Cour de Cassation*, chambre civil 2, 22nd November 1989 in Rev. Arb.1990. 142 comment Guinchard.

judge may refuse to assist the parties⁴⁰ whose difficulties relate to the jurisdiction of the arbitral tribunal or to the functioning of arbitral proceedings once he has noted that an arbitral tribunal has been constituted. He will assist the parties e.g. when in an *ad hoc* arbitration, the arbitration clause does not give enough detail on how to appoint an arbitral tribunal⁴¹; when the arbitration clause just refers to an arbitration being held in Paris, when for instance, no third party or no arbitral institution has been selected in the arbitration agreement⁴²; when arbitrators are challenged or when the replacement of arbitrators is not made by an institutional body.

In practice, several situations occur. The parties disagree about the arbitrators' name simply because they think that a different person should be appointed; consequently they refer their disagreement to the TGI. In front of the judge, both parties relax and try to come to a compromise. Here, his role amounts to psychological help : he puts the arbitration back on the rails and restores a peaceful atmosphere among the parties. A second type of situation occurs, where one party is obstructive and refuses to co-operate. The request for his intervention is often an excuse and a delaying tactic with a view to hampering the good functioning of the arbitration. The parties' behaviour can create extreme difficulties and tensions in handling the situation. The role of the judge is then to purge the arbitration from the vices affecting its good functioning. In this type of case, the demanding party may request the judge's intervention with a view to ensuring that the arbitration will proceed and ensuring that awards will not be set aside⁴³. Once he agrees to intervene in an arbitration, he may, in reality, decide issues capable of affecting the future validity of awards⁴⁴. In the latter, the judge was asked to purge the arbitration of vices which would affect the award at a latter stage.

It is questionable whether the assistance of national judges in constituting the arbitral tribunal amounts to a control over the arbitral process. Judges have been

⁴⁰*Société Chayapon Rice Ltd v Société Ipitrade International*, the TGI of Paris interlocutory order of the 14th October 1985 Rev. Arb.1987. 179 Comment Fouchard and *Société R.E.D.E.C et Pharaon v Société Uzinexport Import et Chambre de Commerce Internationale*, TGI of Paris interlocutory order of the 13th July 1988 Rev. Arb.1989. 97 Comment Bellet.

⁴¹*Société A. v W*, TGI of Paris interlocutory order, 21st February 1983 Rev. Arb.1983. 479 comment Moreau

⁴²*République de Guinée v Chambre Arbitrale de Paris et autres*, the TGI of Paris, chambre 1 section 1, interlocutory order of the 30 May 1986 in Rev. Arb. 1987. 371

⁴³*Philipp Brothers v Société Drexel et autres*, TGI of Paris, 1ere chambre suppl., 24th November 1989 in Rev. Arb.1990. 176 (3rd judgement) comment Kahn. The recalcitrant party was contesting every name of arbitrators given.

⁴⁴*Philipp Brothers case*, TGI of Paris, 1ere chambre suppl., of the 24th November 1989 in Rev. Arb.1990. 176 (3rd judgement) comment Kahn.

granted special powers to ensure the good development of the arbitral process, to overcome hurdles which would paralyse arbitral proceedings. The intervention of the TGI must be limited to assistance with the constitution of the arbitral tribunal and it should not deal with the judicial power of an arbitral tribunal⁴⁵, nor must the judge forget the primary mission of an institutional body⁴⁶ empowered to deal with the arbitral proceedings. In consequence, technical assistance only is given to the parties in the establishment of their arbitral tribunal.

The appointment of arbitrators in Scotland

Article 11 of the Model Law establishes two procedures for appointing arbitrators, namely their appointment pursuant to the agreement of the parties and their appointment pursuant to the Model Law procedure when the parties do not agree on a procedure to appoint arbitrators. It also proposes two alternative mechanisms, one for the appointment of a third arbitrator, another one for the appointment of a sole arbitrator. An essential element is the reference made to an appointing authority, either the court or some other authority, in the terminology used in the text. In both situations, state courts or some other authority intervene in arbitrations to break the deadlock which arises if the parties cannot agree on the composition of arbitral tribunals⁴⁷. Article 11 envisages limited intervention by state courts since an alternative choice is offered by the reference to another appointing authority⁴⁸. It should be seen as giving much more choice to the parties in selecting either national courts or some other appointing authority. In a way, the article can be seen as enhancing the parties' autonomy rather than as restricting the intervention of national courts. Whether it is state courts or another appointing authority, their mission is to secure the appointment

⁴⁵Cette intervention du juge étatique est donc fondée essentiellement sur le respect de la volonté commune des parties et pour lui donner effet, il convient d'éviter toutes les sources de blocage qu'elles soient dues à une partie ou à des éléments extérieurs et c'est dans cet esprit de coopération que le juge étatique intervient sans s'immiscer dans le pouvoir des arbitres'. G. PUYETTE *Rev. Arb.*1992. 317

⁴⁶La deuxième limite de l'intervention du juge étatique se présente lorsque les parties ont désigné un centre d'arbitrage pour organiser le déroulement des opérations d'arbitrage. Dans cette situation, le juge étatique ne doit pas de même se substituer au pouvoir propre du centre de d'arbitrage qui a pour mission d'appliquer son propre règlement. Le juge étatique a donc ici un rôle subsidiaire'. G. PLUYETTE *Rev. Arb.*1992. 317

⁴⁷The reference made to courts or other authority gives a wide range of choice for identifying the body in charge of the appointment. It is normally left to state courts but the option is left open for the intervention of another authority e.g. the Secretary General of the International Bureau of the Permanent Court of Arbitration in the Hague.

⁴⁸It has been said that the article aims at minimising the intervention by state courts where arbitration is taking place. This point of view is very extreme, though. REDFERN & HUNTER 1991 p482

of the missing arbitrator by taking the necessary measures unless the arbitration agreement provides for some other measure for securing the appointment.

When the appointment of the third arbitrator cannot be made by the two already appointed arbitrators, or when a party fails to appoint one arbitrator, then the appointment will be made by the court pursuant to article 11§3.a. A party may request the court's intervention within 30 days.

When the appointment of a single arbitrator cannot be made, because the parties are unable to agree upon the arbitrator, a party is entitled to ask the court to appoint him, pursuant to article 11§3b. There is no indication as to when a party may initiate the procedure and when the parties are assumed to have failed in their attempt to appoint a single arbitrator. No deadline is given for that purpose because it was difficult to select a period which was appropriate to cover all types of cases⁴⁹. The UNCITRAL Arbitration Rules give a 30 day time limit in article 11§3§a. It should be taken as guidance to decide when the parties should be assumed to have failed to appoint. The 30 day time limit is a method allowing a party to keep the arbitration moving, despite its deadlock, by seeking the assistance of the national court. However, the 30 day time limit is also a method of pushing a party into a quick action.

The Model Law does not define a pre-condition for national courts' intervention such as the existence of a real difficulty. It is, nonetheless, said in article 11§3 that national courts shall intervene to help when the parties are unable to appoint or unwilling to appoint. If a party goes before national courts with a view to delaying the commencement of the arbitration and not because this party really wishes to appoint an arbitrator; it is not said whether national courts may refuse to give their help if it appears that the recourse is spurious and does not concern the appointment of arbitrators. It is then left to their discretion to consider whether their help is truly needed and truly necessary to the good functioning of arbitral proceedings.

Once national courts have been requested to proceed, they should take the necessary measures to appoint the missing arbitrator under article 11§4. The Working Group expressly used the words in order to show how to handle the matter. National courts should take 'the necessary measures', but it is not specified in this provision which measures should be adopted. Some directions are given later⁵⁰. In the end, national courts have an entire discretion as to the choice of arbitrators. They are expected to make the appointment without ordering the recalcitrant party to act, which

⁴⁹A/CN.9/264 Analytical commentary : article 11 in HOLTZMANN & NEUHAUS 1989 p363

⁵⁰They are the nationality of arbitrators and the qualities of independence and impartiality.

would cause further delays⁵¹. In order to fulfil their mission of appointing the missing arbitrator, national courts or the other appointing authority have to follow and observe certain criteria set forth by article 11§5. It lists two sorts of criteria namely the nationality of arbitrators and the qualities of independence and impartiality. They should appoint arbitrators who will be seen as independent and impartial by the parties. They should take into account the nationality of the sole arbitrator or of the third arbitrator, which should be different from those of the parties. These criteria are guidelines that should be followed in appointing arbitrators. It is in the interest of the parties that they comply with these criteria. Besides these restrictions, they have nearly a complete discretion. Finally their decision cannot be subject to an appeal⁵².

For domestic arbitration in Scotland, the 1894 Arbitration (Scotland) Act⁵³ provides in sections 2 and 3 that if the parties have failed to concur or to nominate the courts may appoint arbiters. Any of the parties may apply to the court by way of petition. The 1894 Act is not full of details, but some guidance can be found in the Court of Session Rules. The missing information relates to the time limit after which the parties are considered to have failed to nominate. It also relates to the procedure which is to be followed. The power to appoint arbiters is given to the Court of Session or Sheriff Court. Before they may proceed with the appointment, several conditions must be satisfied. Firstly, the agreement to refer, that is the submission, must specify that the disputes be determined by either one or two arbiters, otherwise the court cannot appoint. Secondly, one of the parties must have refused either to concur in the nomination of a single arbiter or to nominate one or two arbiters, otherwise the court cannot act. Scottish courts usually interpret undue delay in concurring as refusal to act, so they would then intervene in the arbitration process.

Conclusion

The state courts' intervention, before the commencement of arbitration, happens in order to break up deadlock and to overcome the parties' difficulties in appointing arbitrators. The parties usually refer to state court to prevent delaying tactics⁵⁴, or when the procedure to appoint arbitrators is inadequate.

⁵¹Fifth Working Group Report A/CN.9/246§32 in HOLTZMANN & NEUHAUS 1989 p378

⁵²Under article 11§5 of the Model Law

⁵³In the process of being replaced at the time of the writing of this chapter

⁵⁴In cases, where a party A constantly refuses the proposed arbitrator by party B, and party A proposes names perfectly knowing that party B will refuse the proposed names. The party going to state court hopes that the recourse to state court would prevent further delays.

State courts cannot be expected to assist the parties with the appointment of the missing arbitrator without some requirements being imposed since the parties prefer to oust the state courts' jurisdiction in going for arbitration. Their intervention might be conditional upon the fulfilment of some requirements, as their intervention cannot be carried out without some restrictions⁵⁵ otherwise the parties may abuse it as shown in the French practice. The legal basis for their intervention is often the real failure of the parties to appoint. Once these conditions are fulfilled, state courts will appoint arbitrators. When assisting international arbitration taking place in their country, state courts may, as indeed is happening in France, impose a further condition i.e. a territorial link or a procedural link between the arbitration and French law. State courts cannot be expected to assist international arbitrations which have no contact whatsoever with the country or the law where the arbitration is taking place, otherwise they would be dealing with a greater workload which could hamper their work quality and the time they can dedicate to their task.

Legislation may provide a detailed procedure on how and when to apply to state courts. Other legislation will not give many details but will rather give general guidelines. The ICC is different since the ICA appoints arbitrators and it confirms the sole and third arbitrators on a regular basis. The ICC method is typical of an institutionalised arbitration whereby a permanent body is in charge of administering arbitration and arbitrator-related problems. The English Act and the Model Law also offer a procedure to appoint arbitrators when the parties fail to do so, and no precondition is required to justify national courts' assistance. National courts, under the 1996 Arbitration Act and the Model Law, will appoint arbitrators in accordance with the arbitration agreement and in accordance with the qualifications required by the parties. Both the Model Law and the 1996 Arbitration Act give a less detailed procedure. They also do not stipulate when the parties will be said to have failed to appoint. The legislation and rules under study provide a good example of how national courts and institutional bodies may assist arbitration in appointing arbitrators and in confirming their appointment.

National courts' intervention in the arbitral process are playing the noble role of an auxiliary of the arbitration process⁵⁶. Why can it be called the noble role of an

⁵⁵Otherwise the parties may wish to go to state courts as soon as possible the next day after the party's refusal to appoint. A reasonable deadline must be given to a party. After the expiry of a reasonable deadline, the party may go to court to prevent further delays.

⁵⁶On ne craindra ni le paradoxe ni l'insolence en affirmant que le juge ordinaire est un auxiliaire de la justice arbitrale. C'est en effet un rôle d'assistance aussi noble qu'utile, que les auteurs du décret, on décider de lui faire jouer.' J.L DEVOLVE L'intervention du juge Rev. Arb. 1980. 607 at 616

auxiliary of the arbitration process ? Considering that the parties oust national courts' jurisdiction in favour of arbitration, national courts are playing the good Samaritan by assisting the parties with the appointment of their arbitrators when needed. Since the parties prefer arbitration rather than state courts to solve their disputes, national courts could refuse to assist the parties at a time when the arbitration process is still unsettled and not yet on the tracks. Despite the parties' faithlessness towards national courts, they will assist the parties.

Part 2 : Interim measures before the constitution of arbitral tribunals

Recourse to national courts for interim measures is commonplace right at the outset of arbitration, especially when arbitral tribunals are not yet completely constituted. This is because at that stage, arbitral tribunals are unable to perform and cannot deal with matters of urgency. Recourse to courts to grant interim measures is apparently the method to obtain a speedy solution. The granting of interim measures by national courts in support of a forthcoming arbitration not yet in existence will be considered in the light of the legal systems and rules under study.

Interim measures in England

With the 1996 Arbitration Act, section 44 encompasses the granting of interim measures by the court and it gives powers to support a forthcoming arbitration and arbitral proceedings. It partly derives from the Model Law (article 9) and from the 1950 Act (section 12§6§d to h). Section 44 lists the supporting powers exercised by the court. For these powers, the recourse to national court is justified when arbitrators are precluded from exercising a specific power (i.e. an Anton Piller order⁵⁷ or a Mareva order)⁵⁸. In comparison with the powers conferred upon the court under section 12§6 of the 1950 Arbitration Act, the power to order security for costs is omitted. This power is now within the ambit of the arbitrator's power.

These powers are in parallel to those granted to arbitrators once appointed. Unless otherwise agreed by the parties, the court has the powers listed in article 44§2 : 'the taking of evidence; the preservation of evidence; the making of orders relating to

⁵⁷ Known as Anton Piller orders after the case of that name *Anton Piller KG v Manufacturing Process* [1976] 1 All ER 779. In the case, the court held that it had an inherent jurisdiction to make an order requiring the respondent to permit the applicants to enter premises for purpose of inspection and seizure of documents which could be destroyed. The order should be exercised only in an extreme case where there is a grave danger of property being smuggled away or of vital evidence being destroyed

⁵⁸ DAC 1996 Report §214-215 p48

property which is the subject of the proceedings or as to which any question arises in the proceedings for the inspection, photographing, preservation, custody or detention of property; or the making of orders for samples to be taken from, or any observation made or experiment conducted upon the property; the sale of goods and the granting of interim injunction or the appointment of a receiver'. The above list is the combination of measures which can be ordered before the constitution of the arbitral tribunal and during arbitral proceedings.

The powers of the court are dependent upon to the agreement of the parties, who are free to exclude some of them, if they wish, while retaining others. But the parties' freedom is limited since they cannot confer different powers from the ones stated above.

Under paragraph 2§a, the court may make orders in respect of the taking of evidence of witnesses, when they are overseas for instance.

Under paragraph 2§b, it has the power to order the preservation of evidence; this may involve a situation of extreme urgency when a search of a party's premises and the seizure of material is needed.

In paragraph 2§c, it has the power to make orders in respect of the property which is the subject of arbitral proceedings. The court has wider powers in comparison to those granted to the arbitral tribunal under article 38§4 because its power extends to property in the hands of a third party, and it can authorise entry by any person into premises in the possession or control of a party to the arbitration.

In paragraph 2§d, it may order the sale of perishable goods. Under paragraph 2§e, it may grant an interim injunction or appoint a receiver.

In paragraph 5, the court, in case of urgency, can make such orders as it thinks necessary for the purpose of preserving evidence or assets when arbitrators or any persons vested by the parties are unable to act. It will intervene on the application of a party or a proposed party to arbitral proceedings. The section does not give further details about what orders they could be. It is logical to think that the orders that were previously mentioned in paragraph 2 are those that would be granted by the court when the arbitral tribunal has not yet been constituted. However, the wording of this section implies that the court has an entire discretion on the choice of interim measures.

Interim measures in France

The parties to an arbitration may have recourse to national courts⁵⁹ for provisional remedies which include most kinds of injunctions. Interim measures fall within the jurisdiction of the president of either the TGI or the TC⁶⁰. The *Cour de Cassation* has acknowledged that national courts have the power to order interim measures, notwithstanding the arbitration clause⁶¹, unless the parties have expressed an intention to the contrary. The justification for the national courts' power lies in the urgency of the situation which cannot wait for the completion of arbitral tribunals.

The case is referred to the *juge des référés* with a simplified procedure that is by way of petition. The strength of the referee procedure lies in its speed, its quality and its enforceability since an interlocutory order (*ordonnance de référé*) is automatically enforceable.

Several measures are available. On the one hand, there are conservatory measures; on the other hand, there are measures relating to evidence ; and finally there is the interim provision which is peculiar to French Law.

Conservatory measures preserve a situation or assets. They provide guarantees and prepare for the enforcement of awards. Their aim is to prevent irreversible and detrimental consequences. Under article 809§1 NCPC, the TGI⁶² prescribes such measures to return matters to their former state either for preventing an imminent loss or for putting a stop to manifestly illicit activities. Attachments (*saisies*)⁶³ are a species of conservatory measure. They may be used when there is any kind of claim against the debtor, which is quantified in monetary terms. The claimant does not need to show that a state of emergency exists, but he must demonstrate that the recovery of his claim is threatened⁶⁴. Once assets are subjected to attachments, they become untransferable as they are detained by third parties. Injunctions and temporary restraining orders are another type of conservatory measure. Pursuant to articles 808 NCPC and 872 NCPC,

⁵⁹The provisions of article 1458 NCPC, (stipulating that a public court must declare itself without jurisdiction, when a dispute is brought to it), do not affect other articles of the NCPC which cover injunctions, and temporary restraining orders.

⁶⁰As an enforcement judge, who are deemed to be the most appropriate because of their skills, their experience and from the standpoint of procedure. This procedure is applied since the 1991 Law of the 9th July 1991. Decree of 31st July 1992 which came into application on 1st January 1993.

⁶¹*SCI Le Panorama v Société Immobilière et Mobilière du Tertre*, *Cour de Cassation*, chambre civile 3, 20th December 1982 in Rev. Arb.1986. 232 and *Adda et autres v Société CHM2 et autres*, Appeal Court of Paris, 14th Chamber, 20th February 1984 in Rev. Arb.1986. 236

⁶²Besides, the TC is also entitled to order such measures according to article 873 NCPC.

⁶³There are several type of attachments listed in the law of the 9th July 1991, in article 67.

⁶⁴Article 67 of the law of the 9th July 1991.

the claimant must demonstrate that he is facing an emergency situation and that the relief sought is not seriously objectionable and is justifiable. If granted, the measure aims at safeguarding the situation in *statu quo*.

Some conservatory measures can provide guarantees or prepare for the enforcement of final awards. With an incomplete arbitral tribunal, one party may need to take steps as early as possible to prevent its opponent from undermining the future enforcement of the award. This often occurs with assets or funds which are likely to disappear. Conservatory measures of this kind may be attachment orders, deposits, sequestration measures, or guarantees⁶⁵. The *République Islamique v Framatome* and *OEAI v Eurodif* cases establish, with clarity, that the power of national judges does not encroach upon the arbitrators' jurisdiction as they deal with a certain situation requiring a quick decision in order to preserve the *status quo*. In the end, arbitrators may disregard the measures, but the *status quo* has been preserved by the interim measures ordered.

At the outset of arbitration, the situation may call for urgent measures to conserve an item of evidence to avoid its disappearance or its deterioration. The *Cour de Cassation* has upheld the principle whereby the existence of an arbitration agreement does not prevent the *juge des référés* from ordering measures protecting evidence⁶⁶. Thus he is able to order such measures under article 145 NCPC and 146 NCPC as well as article 808 NCPC. He may order measures such as statements of facts (*constats*) drawn up by an expert, expertise, sequestration orders, placing under seal, attachments of a conservatory nature. Good examples are found in the *EuroDisney* case law where statements of facts, relating to equipment causing congestion on a building site preventing the start of work, for instance, or expertise procedures were ordered⁶⁷.

Under article 809.2 NCPC, the *juge des référés* may award an interim provision⁶⁸ (*référé provision*) to the creditor or he may order the carrying out of an obligation. This mechanism enables a creditor to obtain an immediate order against the

⁶⁵*République d'Iran et autres v Société Framatome et autres* and *O.E.A.I et autres v Eurodif et autres*, *Cour de Cassation*, chambre civile 1, 20th March 1989 in Rev. Arb.1989.653

⁶⁶*S.C.I Le Panorama v Société Immobilière et Mobilière du Tertre*, *Cour de Cassation*, chambre civile 3, 20th December 1982 in Rev. Arb.1986. 233 comment Couchez

⁶⁷*Euro Disney v D.G.G.E et autres*, Appeal Court of Paris, chambre 14, 18th January 1991, *Euro Disney SCA v SA Gabo and SA Eremco et autres*, Appeal Court of Paris, chambre 14, 22nd May 1992 in PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES at 83 and 84

⁶⁸This is a provisional payment granted to the creditor against the debtor which requires a careful examination of the merits of the case by the judge awarding it.

debtor, which may amount to the whole sum due⁶⁹. The order is a provisional measure and it will be utilised until arbitrators have finally been appointed. It has been heavily criticised for encroaching on the arbitrators' jurisdiction as it may require the judge to rule on the merits of the case⁷⁰. On the other hand, it has also been said that its provisional nature implies that arbitrators may modify it or disregard it. Thus their jurisdiction is not encroached upon by national judges⁷¹. The other point of contention about the interim provision lies in the fact that such a measure allows the creditor to have an enforceable title that may correspond to the whole amount of his claim. To counterbalance this point, it should be kept in mind that such a measure is only provisional and can always be changed at a later stage by arbitrators considering the case.

Despite the opposing views about the interim provision, it appears that the *Cour de Cassation* managed to achieve a fair balance. Besides, such a measure can be beneficial to the requesting party without being too inconvenient to the other party as long as it is reviewable and may be altered by arbitrators.

Interim Measures and the ICC Rules

The ICC Rules envisage the need for the intervention of national courts to obtain conservatory and provisional measures⁷².

Article 8§5 of the 1988 Rules has several main features. The first is the recognition of the parties' right to apply to any competent judicial authority for interim and conservatory measures before the file has been transmitted to arbitrators and, in exceptional circumstances, even thereafter. Arbitrators do not seem to have the right to apply. Secondly, arbitrators are not authorised to issue such measures which, in fact, they cannot really do since arbitral tribunals are rarely quickly constituted⁷³. The final point of significance is that any application made to any judicial authority must be notified to the Secretariat which is then responsible for informing arbitrators thereof.

⁶⁹This is done with a view to safeguarding the entirety of the debt and it should prevent people from using the sum of money.

⁷⁰It has been said that, in the domain of international arbitration, such a practice involves a deprivation of the jurisdiction of arbitrators, since national judges have to consider the merits of the case to assess the merits of the right of the creditor to obtain such a measure. PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES 1993 at 87

⁷¹PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES at 87

⁷²In article 8§5 of the 1988 ICC Rules

⁷³Except in fast-track arbitrations. Delays are usually due to the parties or to difficulties in finding the right arbitrator.

The central idea is to encourage recourse to national courts for interim and conservatory measures. To preclude such recourse would be to deny the true difficulties which may arise at the outset of an arbitration. Until arbitral tribunals are able to issue such measures, if ever given such a power, relief should be available unless the parties have thought of a particular procedure to fill the gap. Considering that the complete constitution of arbitral tribunals and for arbitrators to receive the file may take up to several months, incidents may happen that need to be urgently dealt with.

The provision speaks of any competent judicial authority. Such a vague expression does not specify which authority is indeed competent. Which court a party will apply to depends on where the arbitration is taking place. The matter was directly considered in the famous *Channel Tunnel* case⁷⁴. The English Appeal Court held that it had no jurisdiction as long as the arbitration was taking place abroad even if the parties had chosen English law to apply to it⁷⁵. Although the House of Lords⁷⁶ agreed that such a power cannot arise from section 12§6, it nevertheless took the view that the English Court had power to grant the interim order under section 37§1 of the Supreme Court Act 1981⁷⁷. For ICC arbitrations and for any other *ad hoc* arbitrations, recourse to national courts may prove to be difficult. Recourse depends upon the situs of arbitration, or where the assets are located, or where the claimant has his domicile and so on.

In the *Ken Ren* case⁷⁸, the House of Lords took the view that it should exceptionally exercise its discretion to order security for costs⁷⁹. The decision was

⁷⁴*Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*, Court of Appeal Civil Division [1992] 2 All ER 609. The contract was governed by common principles of English and French law and in their absence by general principles of international trade law. A disagreement occurred about the price of additional work. The matter was referred to an ICC arbitration in Brussels. The employer, prior to an arbitration being commenced, applied to the Commercial Court in England for an injunction restraining the contractors from suspending work. The issue was to determine whether English Courts had jurisdiction to grant an injunction considering that some of the parties were not English and that the ICC arbitration was taking place abroad. Lord Justice Staughton concluded that an English Court did not have jurisdiction to grant the requested injunction under the 1950 Act section 12.6 since the situs of the arbitration was foreign i-e in Brussels.

⁷⁵*Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*, Court of Appeal Civil Division [1992] 2 All ER 609 per Lord Justice Staughton at 619-625

⁷⁶The House of Lords ruled upon the appeal in a manner differing from the Court of Appeal. *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*, House of Lords [1993] 1 All ER 664

⁷⁷*Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] All ER 664 at 684-688

⁷⁸*SA Coppée Lavalin v Ken Ren Chemicals and Fertilizers Ltd (H.L.(E))* [1995] A.C 38. The plaintiffs, Belgian and Austrian companies, entered into contracts with the Kenyan defendant of which the state of Kenya was the majority shareholder. Disputes arose and the defendant lodged requests for

based on the grounds that the claimant was insolvent after the entire payment of the advance of costs for the ICC arbitrations to proceed and that the arbitration was being funded by a third party that would have no responsibility for paying the respondents' costs if they won. The majority of the House considered that the present case was sufficiently exceptional to justify departing from what should be the normal approach to ordering security for costs⁸⁰. The position chosen by the court that it should be involved in matter such as deciding whether a claimant in an arbitration should provide security for costs has received universal condemnation⁸¹. The present writer believes that such an attitude showed the courts unwillingness to promote the UK as a world arbitration centre. The writer also shares the dismay shown by practitioners. In his dissenting opinion, Lord Mustill considered that the court should not interfere with the arbitral process because the parties chose an ICC arbitration which is an 'unmistakable signal of their intention'⁸² that they preferred the ICC framework rather than the local law even if the arbitration is located in England. This choice suggested that the parties were not looking for any specific connection with national courts and the English court's intervention was consequently inappropriate in the present case. Lord Mustill's dissenting opinion gave an interesting analysis of the parties' choice. It is undoubtedly true that choosing an ICC arbitration is an indication of the parties' choice to prefer the ICC framework rather than any system of law. National courts' intervention is however justified in circumstances where arbitrators lack such a power; their intervention is then aimed at assisting arbitral proceedings. In the present writer's view, the intervention of the English court was nonetheless justified because of the exceptional circumstances. Since the 1996 Arbitration Act has now given the power to order security for costs to arbitrators, the temptation for courts to abuse such discretion is now removed and it is best this way.

ICC arbitrations. The defendant had to pay the entire advance for costs required by the ICC for the arbitration to proceed. Arbitrators were appointed. The plaintiffs issued summonses in the High Court pursuant to the section 12.6 of the 1950 Act seeking orders for the security for costs in the arbitration.

⁷⁹This decision raised a strong controversy which would have had negative impact on the choice of situs for England if the English courts interfere in the arbitration process. Consequently the 1966 Act drafters realised that they had to change the law if England was to stay a favoured situs for arbitration. The 1996 Arbitration Act meets the objection to the *Ken Ren* case where notwithstanding that ICC arbitrators had no power to order security for costs the court did so. Pursuant to section 38.3 of the Act, arbitrators have now such a power.

⁸⁰It is not right to say that there will never be circumstances in which it will be inappropriate to order security for costs, only that it will be rarely right to do so. In the exceptional case, however, it is important that the court should exercise its jurisdiction.' *SA Coppée Lavalin v Ken Ren Chemicals and Fertilizers Ltd* (H.L.(E)) [1995] A.C 38 at 71 per Lord Wolf

⁸¹DAC 1996 Report p44

⁸²*SA Coppée Lavalin v Ken Ren Chemicals and Fertilizers Ltd* (H.L.(E)) [1995] A.C 38 at 63 per Lord Mustill

Article 8§5 of the 1988 Rules has been criticised because it was not entirely satisfactory due to its vagueness⁸³ and was unable to provide meaningful guidance to inexperienced users⁸⁴. A further problem was whether the application to municipal courts by the claimant would infringe the agreement to arbitrate⁸⁵. For these reasons, the 1998 Rules give more detail in article 23 and this would seem to answer the criticisms. Article 23 stipulates that the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party would not be an infringement or a waiver of the agreement to arbitrate and does not affect the relevant powers reserved to the arbitral tribunals, as might have been previously thought. This provision clarifies the situation and makes matters easier for first time users.

Since 1990, the ICC Rules have contained a pre-arbitral referee procedure⁸⁶ whereby an arbitral referee is appointed in urgent circumstances where an appropriate contract clause so provides. The said procedure is available prior to arbitral proceedings on the merits of the dispute when an urgent decision is needed. The requesting party should send its request to the Secretariat and to the other party by the quickest method of delivery. It should include the orders sought, an explanation and the reasons for the requested orders. The responding party must answer within eight days of the receipt by the quickest method of delivery. The referee is either chosen by the parties or is appointed by the Chairman of the ICA after consideration of the technical and professional qualifications needed, nationality, residence and so on. The referee has, subject to the agreement of the parties, wide powers to make an order within 30 days. Under article 5§3, the referee has a wide latitude to organise such procedure as he deems appropriate. He is authorised to make an immediate provisional decision upon the request of a party. Under article 2§1, he has the power to order any conservatory measures or any measures for restoration that are urgently necessary to prevent either immediate damage or irreparable loss; to order a party to make to any other party or to another person any payment which ought to be made; to order a party to take any step which ought to be taken according to the contract between parties,

⁸³The expression 'exceptional circumstances' has been a source of problems. R. KREINDLER *Impending Revision of the ICC Arbitration Rules : Opportunities and Hazards for Experienced and Inexperienced Users Alike* in 1996 *Journal Int. Arb.* Volume 13 number 2 p45 at 82 (Hereinafter KREINDLER in *Journal Int. Arb.* 1996)

⁸⁴KREINDLER in 13 *Journal Int. Arb.* 1996. 82

⁸⁵KREINDLER in 13 *Journal Int. Arb.* 1996. 83

⁸⁶The said procedure seems to be rarely used in practice. This could be explained by the fact that it might be difficult to find a person willing to perform such a task within a short notice who then has to leave the matter, unless the parties agree for the pre-arbitral referee to become an arbitrator.

including the signing or the delivery of any document or the procuring by a party of the signature or delivery of a document; to order any measure necessary to preserve or establish evidence. His order is binding on the parties, remaining in force until the arbitrators are able to judge the merits of the dispute. The text establishes an interesting alternative to recourse to national courts. Its only disadvantage is the lack of legal sanction against the person to whom an interim measure is directed. The pre-arbitral referee procedure is a complementary tool available within the ICC framework. It is a quick and specific procedure and responds to the needs of the actors in international arbitration practice. The combination of the pre-arbitral referee procedure and arbitration is helpful to the parties to determine what are really the issues that they really want to take to arbitration and narrows the scope of the arbitration to the most intractable disputes⁸⁷. In proposing the pre-arbitral referee procedure, the ICC has filled a gap and has rightly answered the need of its customers.

Interim measures in Scotland

Article 9 of the Model Law stipulates that it is not incompatible with an arbitration agreement for a party to request interim measures of protection from national courts. Thus a party is not barred from arbitrating by seeking interim measures of protection from national courts whether before or during arbitral proceedings. The Secretariat thought that such a specific mention of the right of national courts was a necessary reference to be made in the light of divergent judicial decisions pursuant to the New York Convention⁸⁸. In article 9, there is no limitation to any particular kind of interim measures. A wide range of measures is then available on request by the parties : measures to conserve the subject matter of the dispute, measures to protect trade secrets and proprietary information, measures to preserve evidence, measures like attachment which secure an award and assets, and measures required from third parties⁸⁹. The Scottish version is wider. It is also more explicit as it indicates what has to be understood by the expression 'interim measures of protection'⁹⁰. Granted by the Court of Session or by Sheriff Courts, they include

⁸⁷B. DAVIS The ICC Pre-Arbitral Referee Procedure in context with technical expertise, conciliation and arbitration in 9 Int. Cons. Law Rev.1992. 218 at 229

⁸⁸HOLTZMANN & NEUHAUS 1989 Some refused to order such measures on the ground that they would impede arbitration proceedings, while others granted such measures on the ground that they did not obstruct arbitration, but rather ensure that an award will be preserved p332.

⁸⁹HOLTZMANN & NEUHAUS 1989 p333

⁹⁰While that provision is generally satisfactory, it appears to the Committee that it would be appropriate that more detail should be spelt out as to what could be meant or is means by this article'. The Dervaid Report p11

arrestment, interim interdict and inhibition ensuring that an award is not rendered ineffectual by the dissipation of assets by another party.

Arrestment is the freezing of movable property in the hands of a third party to obtain a security against a debtor. The measure may be carried out at any time until the case has been disposed of. It will automatically be granted on application to the court as a routine administrative act⁹¹. An inhibition is an order forbidding a debtor to burden or to part with immovable property to the prejudice of a creditor. An inhibition does not involve third parties, but is restricted to preventing the debtor from selling or dealing with his own immovable property. It may be granted in respect of a future or contingent debt⁹². If the pursuer succeeds in the action, another procedure is necessary to transfer the property⁹³ into the hands of the pursuer. Finally, an interim interdict is a provisional remedy granted by a Scottish court forbidding an act or course of action. Interim interdict is a discretionary remedy granted to regulate or preserve the rights of the parties, pending the final determination of a dispute. Contrary to the two previous remedies, the applicant for an interim interdict must show why he should be granted such a remedy, e.g. if he is victim of a wrong or a threatened wrong and has averred sufficient facts to establish a need for protection⁹⁴. Measures to preserve evidence are also available. If a future witness in an arbitration might be away for a long period of time, the court may appoint a commissioner to obtain the oral statement of that person before he becomes unable to testify. And pursuant to the 1972 Administration of Justice (Scotland) Act⁹⁵, if one fears that documents may vanish the court may intervene in the arbitration to preserve these documents.

In a landlord-tenant dispute⁹⁶, Lord Penrose examined whether section 1 of the 1972 Administration of Justice (Scotland) Act applies to arbitration proceedings. The landlord and tenant served a number of notices and counter notices⁹⁷, and the landlords

⁹¹W.G. SEMPLE in *PROVISIONAL REMEDIES IN INTERNATIONAL COMMERCIAL ARBITRATION* 1994 p579 at 583 (Hereinafter SEMPLE in *PROVISIONAL REMEDIES* 1994)

⁹²SEMPLE in *PROVISIONAL REMEDIES* 1994 at 586

⁹³Respectively an action of Furdcoming and an action of Adjudication

⁹⁴SEMPLE in *PROVISIONAL REMEDIES* 1994 at 587

⁹⁵Under section 1 of the 1972 Administration of Justice (Scotland) Act, the Court of Session and the Sheriff Court may order the production, inspection and preservation of documents and other property as to which any question may relevantly arise in civil proceedings. It also confers on these courts the power in relation to pre-trial disclosure of evidence.

⁹⁶*Anderson v Gibb* (OH) 1993 SLT 726 per Lord Penrose

⁹⁷The landlords of a farm served a notice on their tenant requiring him to remedy an alleged breach of duty under the lease to reside on the farm and to keep sufficient stock on it, the stock to be his property. The landlords then served a notice to quit, alleging failure to stock the farm and a failure to keep only his own stock on the farm. The tenant served a counter notice requiring all questions

applied to the court by petition for an order under section 1 of the 1972 Administration of Justice (Scotland) Act for the production, recovery and retention of documents relating to the ownership of stock on the farm during the two years prior to the date of application. The purpose of the application was to recover the documents for use in the arbitration. After examining both parties' arguments⁹⁸, Lord Penrose took the view that the expression 'civil proceedings' should receive its general wide meaning, namely that it applies to proceedings of a civil character irrespective of the court or tribunal before which they may be raised⁹⁹ and includes arbitration. In this case, Lord Penrose explained that the powers of the Court of Session and the Sheriff can apply if there is a need for a future arbitration.

Conclusion

Although national judges intervene in arbitration, their intervention must not interfere in the subsequent arbitration procedure. They only intervene in 'the spirit of aid and co-operation'¹⁰⁰. They give technical assistance to arbitration to enable its good functioning. They play the role of the good Samaritan in rescuing the future arbitration which has not yet been on the track. In granting interim measures, they safeguard the subject-matter of the future arbitration and documents or evidence that may be necessary for arbitrators to decide the case. In doing so, they carry out a useful and positive action towards arbitration. In this respect, they offer their support and their assistance to the forthcoming arbitration. Their orders are provisional and arbitrators are free to disregard them or to transform them if they wish, but the situation between the parties is safeguarded and no further harm can be done.

In the legal systems studied above, it has been seen that national courts intervene at the outset of the arbitration process. With the generalisation of international arbitration and the widespread use of arbitration on a world-wide basis, the relationships between national courts and arbitral tribunals can only be encouraged. They are 'increasingly sensitive to each other's strengths and weaknesses insofar as the ordering of interim measures is concerned and seek to act as complements to each

arising out of the reasons for the notice to quit to be determined by arbitration under the Agricultural Holdings (Scotland) Act. *Anderson v Gibb* (OH) 1993 SLT 726 per Lord Penrose

⁹⁸The respondent argued that section 1, second branch of the provision does not apply to arbitration, while the petitioners argued that the expression 'civil proceedings' should receive its ordinary wide meaning. *Anderson v Gibb* (OH) 1993 SLT 726 at 727 and 728

⁹⁹There being no basis on which to construe the expression as to exclude arbitration proceedings, I shall repel the first plea in law for the respondent.' *Anderson v Gibb* (OH) 1993 SLT 726 at 729 per Lord Penrose

¹⁰⁰PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES 1993 at 76

other rather than as competitors'¹⁰¹. This statement presents very well the current trend in the national courts and arbitration relationships which is definitively the right position to adopt. Both actors have their interests and their 'share of the cake' is protected. National courts have their work load reduced in favour of potential arbitration and future arbitrations can proceed on the right path.

The provisional measures granted by national courts have a binding nature. The implementation of provisional measures granted by national judges is easier, because they have coercive powers vested by the state they are working for. The only difficulty arising with provisional measures ordered by national judges is that they are often restricted to a given territory, that of the state of the forum. For international arbitrations, this fact may have some consequences for the implementation of the provisional measures in question if the assets or evidence are located in several countries.

Part 3 : Situation where party A refers the dispute to national courts rather than to arbitration despite an arbitration agreement with party B

An arbitration agreement has several different effects either positive or negative. Both are the usual effects of arbitration clauses in any legal system. In fact, if a legal system was not to deduce them it would be denying the concept of arbitration and the parties' autonomy to oust the national courts' jurisdiction.

The negative effect is that national courts must decline jurisdiction with respect to disputes which are the object of a valid arbitration agreement. It is called the principle of incompetence for national courts. It is widely recognised by most legal systems. The positive effect implies that the parties to arbitration should refer their already existing disputes or disputes which have not yet arisen to arbitration. The positive effect imposes the idea that any disputes within the ambit of an arbitration clause should be referred to arbitration and to arbitrators if appointed. When a party refers its disputes to national courts before the constitution of an arbitral tribunal, even though there was an arbitration agreement, what happens? If party A refers its disputes to national courts and party B wants to implement the arbitration agreement, some further difficulties may occur. Such a situation will be considered in the light of the legislation and rules under study.

¹⁰¹BOND in CONSERVATORY AND PROVISIONAL MEASURES 1993 p72 at 20

Article II.3 of the 1958 New York Convention deals with this matter. It stipulates that the court of a contracting state, when seized of an action shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The expression which must be looked at with attention is 'refer the parties to arbitration'.

It can have two procedural meanings¹⁰² : either a court staying the court proceedings or a court order imposing arbitration. The first means that if the court refers the parties to arbitration then the court proceedings are stayed. It has been said that the second meaning is unthinkable simply because a court order, whereby the parties must refer to arbitration, is unknown in most countries¹⁰³ unless arbitration is imposed by law. In the end, it is up to the parties to secure that their arbitration takes place, since recourse to arbitration is a consensual method. The legal effect of the expression is a partial incompetence of national courts vis-à-vis arbitration. Consequently, national courts become incompetent to try the merits of dispute when there is a valid arbitration agreement. However, national courts do not lose complete competence vis-à-vis arbitration in the sense that they do retain a certain competence as to arbitration-related matters¹⁰⁴.

In England

In the 1996 Arbitration Act, section 9 reproduces the law in relation to stay of legal proceedings prior to the Act¹⁰⁵ but with certain changes. In the 1950 and 1975 Acts, any party to the proceedings could apply for a stay¹⁰⁶. Section 9 also corresponds to the Model Law (article 8).

In *the Channel Tunnel* case¹⁰⁷, Eurotunnel commenced an action in the High Court for an interim injunction against the contractors. The contractors applied for a stay of the proceedings under section 1 of the 1975 Act. Judge Evans refused a stay, holding that he had no power to grant it as there had been no reference to the expert panel which was a necessary preliminary to that arbitration. The Appeal Court differed from the judge. The fact that the preliminary step had not been taken and did not

¹⁰² A.J. VAN DER BERG *THE NEW YORK CONVENTION OF 1958 : TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 1994 at 129 (Hereinafter VAN DER BERG 1994)

¹⁰³ VAN DER BERG 1994 at 129

¹⁰⁴ Matters will be studied later on in chapter 3.

¹⁰⁵ In section 4§1 of the 1950 Act and in section 1 of the 1975 Act.

¹⁰⁶ Thus a plaintiff could take procedures to arrest a ship or any other interim measures and then applied for a stay so as to send the matter to arbitration. With the 1996 Arbitration Act the party will be unable to do so.

¹⁰⁷ *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*, Court of Appeal Civil Division [1992] 2 All ER 609 The parties envisaged a two stage procedure to resolve their disputes. They were first to go to a panel of experts and then to an ICC arbitration in Brussels.

prevent the court from ordering a stay under section 1 of the 1975 Arbitration Act because a dispute undoubtedly existed. According to the court, a stay should be ordered if there was a dispute with regard to a matter agreed to be referred to arbitration unless it was shown readily and beyond doubt that the defendant to the action had no grounds at all for disputing the claim¹⁰⁸. In the House of Lords¹⁰⁹, Lord Mustill examined the difficulty which arises with the application of section 1 when the facts do not quite measure up to the criteria of that section.

The 1996 Arbitration Act is designed to answer the problems encountered in such circumstances. Section 9 states that 'a party to an arbitration agreement against whom legal proceedings are brought (whether by way of a claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter'. This is a mandatory provision. Its drafting represents a significant improvement in that the reference is now made 'to any party to an arbitration agreement against whom legal proceedings are brought'. It is clear from the provision that the only party entitled to request such a stay is the person against whom it was brought. Here lies the difference with the wording of previous provisions in the 1950 and 1975 Arbitration Acts¹¹⁰. It also makes clear that legal proceedings either brought by way of claim or by way of counterclaim will be stayed by courts. The 1996 Arbitration Act has a wider coverage in that respect.

¹⁰⁸*Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*, Court of Appeal Civil Division [1992] 2 All ER 609 per Staughton L.J at 618. The House of Lords reached the same decision but the routes were slightly different.

¹⁰⁹*Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All ER 664 per Lord Mustill. Lord Mustill was worried because the nature of the relief was not arbitration but the reference to a panel of experts as originally in the New York Convention. Besides he was unhappy with the wording of section one, because the section not following the wording of the New York Convention left free the plaintiff free to choose whether or not to arbitrate after having obtained a stay of proceedings. Section 9§2 is new and allows an application for a stay to be made even though the matter cannot be referred to arbitration until some steps (i.e. conciliation or expertise) have been met. This positively answers to Lord Mustill's worries.

¹¹⁰With the section 1 of the 1975 Act, which is repealed by the 1996 Arbitration Act, the courts said that an invalid defence does not constitute a dispute. As English courts thought that people would go to court for no reason, so an addition to the original text of the New York Convention was added. In *Guandong Agriculture Company Ltd v Conagra International (Far East) Ltd*, the court was asked whether there was a dispute between the parties capable of being referred to arbitration in the light of section 1 of the 1975 Arbitration Act. The judge said that a non-admission of a claim was sufficient for the matter to be referred to arbitration. It was for the arbitrator to examine the merits on each side. *Guandong Agriculture Company Ltd v Conagra International (Far East) Ltd*, Hong Kong Supreme Court, 24th September 1992 in Arb. Disp. Res. Law Journ. 1993.101

Section 9 paragraph 2 states that an application to stay legal proceedings can be made 'notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures'.

In France

If such a situation happens, article 1458§2 NCPC applies. It stipulates that 'if the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null'. The principle according to which the parties should be referred to arbitration by national courts is clearly stated here and it has been confirmed in practice.

In *Société Korsnas Marama v Société Durand-Auzias*¹¹¹, the Appeal Court held that if an arbitration clause is valid and effective then it should be implemented by the parties directly concerned ; the arbitration clause also requires the dispute to be referred to the arbitral tribunal¹¹². An arbitration agreement had initially been agreed between the parties. Despite the arbitration clause, Durand-Auzias issued a writ against Korsnas (*sur assignation*) and put before the *Tribunal de Commerce* (TC) its request for damages for unlawful breach of contract. The court decided that it had jurisdiction to deal with the matter rather than the arbitral tribunal in Sweden. An appeal was brought, demanding that French courts be declared incompetent to deal with the merits of the case. Thus, the Appeal Court controlled the validity of the arbitration clause as to which court was competent to deal with the dispute (either French courts or the Swedish arbitral tribunal). The competency of French courts would arise only if the arbitration clause was null. The Appeal Court concluded that future disputes should be referred to the arbitral tribunal as the arbitration clause was valid.

In *Société Anhydro v Société Caso Pillet*¹¹³, Caso Pillet went before the *Tribunal de Commerce* of Bordeaux to obtain payment of its bills. Anhydro claimed that according to the arbitral clause referring future disputes to arbitration, arbitrators should have jurisdiction. The case went to the *Cour de Cassation* on appeal. It was of

¹¹¹*Société Korsnas Marma v Société Durand-Auzias*, Appeal Court of Paris (chambre urg.), 30th November 1988 in Rev. Arb.1989. 691 comment Tschanz.

¹¹²*Société Korsnas Marma v Société Durand-Auzias*, Appeal Court of Paris (chambre urg.), 30th November 1988 in Rev. Arb.1989.691 at 694 and 696

¹¹³*Société Anhydro v Société Caso Pillet et autres*, *Cour de Cassation*, chambre civile 1, 7th June 1989, in Rev. Arb.1992. 61 comment Derains. A French company Caso Pillet had a contractual obligation with a Danish company Anhydro to deliver three production line. Further to the contract, Anhydro required the delivery of additional goods, but refused to pay for them. While the Caso Pillet considered these goods as being outside the scope of the contract whereas Anhydro refused to pay for those goods on the ground that they were part of the contract.

the view that the matter in question was not within the jurisdiction of French courts because of article 1458§2 NCPC¹¹⁴. The *Cour de Cassation* specified that the implementation of article 1458 NCPC for an international arbitration does not depend upon the submission of the arbitration to French law¹¹⁵.

The principle of partial incompetence of national courts is well established and its implementation appears to be rather straightforward. The *Cour de Cassation* has clearly established its boundaries. A question arises from the principle of partial incompetence for national courts. It is said that the validity of the arbitration clause implies the partial incompetence of national courts. Do they have to declare their incompetence if the arbitration clause is not manifestly null ? Yes, they have to, even if there is a slight doubt.

Under the ICC framework

There is no specific provision dealing with the situation where one of the parties refers its disputes to national courts despite an ICC arbitration clause. The reason is simple. As any arbitration under ICC auspices is an institutional arbitration, the ICA will not help the parties. If one of the parties goes before any national courts in the country where it has assets and property or in the country where the subject-matter is located, despite an ICC arbitration clause, the national court in question will certainly follow the principle laid down by article II.3 of the 1958 New York Convention provided it is a signatory to the New York Convention.

A plaintiff eager not to go to arbitration will certainly allege, when he brings his case in court, that the arbitration agreement invoked by the defendant is null and void, inoperative or incapable of being performed. The court may examine the objection raised and after such examination, if the ICC arbitration clause is valid, it will decline jurisdiction and order the parties to proceed with their arbitration under ICC auspices. The court may exercise its discretion before giving effect to the arbitration agreement. But it will rarely refuse to give effect to the arbitration agreement as long as it is valid.

¹¹⁴ 'Il n'appartenait pas à la Cour d' Appel de décider si le tribunal arbitral prévu au contrat de vente était compétent, ce qu'elle exprime un peu maladroitement par le recours à la notion d'arbitrabilité, mais de se prononcer sur la compétence de l'autorité judiciaire à la lumière des dispositions de l'alinéa 2 de l'article 1458'. *Société Anhydro v Société Caso Pillet et autres*, *Cour de Cassation*, chambre civile 1, 7th June 1989, in *Rev. Arb.*1992. 61 at 64

¹¹⁵ *Société Anhydro v Société Caso Pillet et autres*, *Cour de Cassation*, chambre civile1, 7th June 1989, in *Rev. Arb.*1992. 61 at 66.

In Scotland

The Model Law stipulates in article 8§1 that 'a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. Like the 1958 New York Convention upon which article 8 is modelled, it requires national courts to give effect to the arbitration agreement. The exclusion of the national courts' jurisdiction occurs unless the arbitration agreement is null and void, inoperative or incapable of being performed. The reference of the parties to arbitration should be automatic as long as national courts check the validity of the arbitration agreement and as long as they are satisfied with its validity. In considering article 8, the Dervaird Committee was of the view that the point in time at which the right to require resort to arbitration is lost should be when the pleadings are finalised. Consequently, the Committee thought that it would be appropriate to change the wording and add the words 'at any time before the pleadings in the action are finalised' in order to conform to the existing Scottish practice at the time¹¹⁶.

For domestic arbitration, 'if the parties have contracted to arbitrate, to arbitration they must go'. The famous sentence of Lord Dunedin¹¹⁷ shows the compulsory character of arbitration. Once the parties have chosen to go to arbitration they should not change their mind. Once the parties have freely chosen to go to arbitration, their choice must be respected. In *Hamlyn and Co v Talisker Distillery*¹¹⁸, it was said that the law of Scotland has from the earliest time permitted private parties to exclude the merits of any disputes from the consideration of the courts. The parties' freedom to oust the courts' jurisdiction¹¹⁹ in favour of arbitration was accepted. The court has no discretion as to whether or not the arbitration agreement should be enforced : once the parties have contracted to go to arbitration 'to arbitration they must go'. While the agreement subsists resort to courts is not allowed for the parties regarding any of the

¹¹⁶The Dervaird Report p11

¹¹⁷*Sanderson v Armour and Co* 1922 S.C 117 at 126 per Lord Dunedin

¹¹⁸*Hamlyn and Co v Talisker Distillery* 1894 SLT 12

¹¹⁹*Hamlyn and Co v Talisker Distillery* also established that the court's jurisdiction is not wholly ousted by the arbitration agreement. 'It deprives the court of jurisdiction to inquire into and decide the merits of the case while it leaves the court free to entertain the suit, and pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive the full jurisdiction of the court will revive to the effect of enabling it to hear and determine the action upon the merits'. 1894 SLT 12 at 13 Lord Watson

questions embraced in the contract¹²⁰. If a party, despite the arbitration agreement, brings the dispute before the court, it will not intervene other than to ensure that the parties go back to arbitration.

Conclusion

When a party refers its disputes to national courts before the constitution of an arbitral tribunal, despite an arbitration agreement, national courts should refer it to arbitration if the arbitration clause is not null and void, inoperative or incapable of being performed, in conformity with article II.3 of the 1958 New York Convention which has been the reference point for many statutes. The parties who entered into an arbitration agreement cannot change their minds and refer their disputes to national courts just because they feel unhappy with the way the future arbitration is developing. As long as the parties enter a consensual agreement to arbitrate already arisen disputes or not yet arisen disputes, such agreement is considered as the mark of their will to opt out from the jurisdiction of national courts.

Once they have entered into such an agreement they should keep their word and comply with it. The parties cannot be allowed to change their minds and disregard their word as soon as a difficulty occurs with the arbitration. If the parties are unable to keep their word, national courts might feel that they must intervene in arbitration to a greater extent. In the end, the constant refusal of the parties to go to arbitration might have harmful consequences for arbitration, if the parties go before national courts every time they have the feeling that they might lose the forthcoming arbitration or just to delay its commencement. Consequently, national courts might feel that they have to recover control over the operations and prevent the parties from ousting their jurisdiction simply because they do not know what they really want. Thus arbitration might lose its independence from national courts and the parties might suffer for it. It is difficult to imagine that national courts would now change their attitude towards arbitration and go back to a more interventionist attitude.

There is a situation that has not yet been considered. In a situation where the arbitration proceedings have long been finished and the enforcement of an award is being asked from a national court, a party argues that such enforcement cannot be granted on the ground that the arbitration agreement is not valid.

¹²⁰See also *Smith v Wharton-Duff*, 28th Feb. 1843 5D 749. 'The pursuer is not entitled to demand either a proof by commission or on a trial, but is bound to concur with the defender in the nomination of 'men mutually chosen' to ascertain compensation due.' at 750

In *DST v Rakoil*¹²¹, the English Appeal Court examined whether or not the Geneva award obtained by *DST* should be enforced. *Rakoil* argued that the arbitration agreement should have been subject to the law of R'as Al Khaimah and that under that law it was void. *Rakoil* justified its argument on the ground that the arbitration agreement is submitted to the system of law with which the transaction has the closest and the most real connection and that was the law of the state of R'as Al Khaimah. The judge considered that the arbitration agreement constituted a self-contained contract which does not need to be governed by the same law as the one of the underlying contract. And the fact that the parties referred the disputes to an ICC arbitration suggested that according to article 13§3 of the ICC Rules, the arbitrators had to decide which law governed the arbitration agreement. Arbitrators did not hold that the governing law was the law of R'as Al Khaimah but Swiss law. Since the governing law of the arbitration was Swiss law, the issue of validity of the arbitration agreement should be addressed under Swiss law. And under Swiss law the arbitration agreement was valid. *DST* thus obtained the enforcement of the award and a garnishee order requiring Shell to pay its debt to *DST* rather than to *Rakoil*.

This case is particularly interesting because it provides several situations : *Rakoil* went to a civil court in the state of R'as Al Khaimah, despite a valid arbitration clause and an arbitration going on, and obtained rescission of the agreement and damages. The bringing of the proceedings in the court of that state was a breach of the arbitration agreement, as it was valid according to the arbitrators' decision ; the court should have declared its incompetence. The second situation was the enforcement issue of the Geneva award, in 1986, where *Rakoil* argued that the arbitration agreement was not valid. This case shows that a national court may accept that the action can proceed despite a valid arbitration clause and an ongoing arbitration located

¹²¹Disputes arose between the plaintiffs (*DST*) and the defendants (*Rakoil*) under an oil exploration agreement which contained an ICC arbitration clause. In March 1979, *DST* referred the disputes to an arbitration taking place in Geneva according to the law adopted by the arbitrators. But in April 1979, *Rakoil* instituted proceedings in the court of R'as Al Khaimah for the rescission of the agreement on the ground that it had been obtained by misrepresentation and also for damages. Neither party took part in the proceedings instituted by the other, *DST* succeeded in the arbitration and was awarded US \$4, 635, 664 while *Rakoil* succeeded in its litigation whereby *DST* was held liable to *Rakoil* for a substantial sum of money. In June 1986, *DST* heard that an English company Shell owed money to *Rakoil*, so *DST* set about trying to satisfy the award obtained in 1979 out of Shell's payment to *Rakoil*. So *DST* applied for leave to enforce the Geneva award and for an injunction restraining *Rakoil* from removing assets outside the jurisdiction. In *DST v Rakoil*, *Rakoil* went to a civil court in the state of R'as Al Khaimah, despite a valid arbitration clause and an arbitration going on, and obtained rescission of the agreement and damages. The bringing of the proceedings in the court of that state was a breach of the arbitration agreement, as it was valid according to the arbitrators' decision ; the court should have declare its incompetence. *Deutsche Schachtbau-Und-Tiefbohrergesellschaft v R'as Al Khaimah National Oil Co and another appeal*. (1987) 2 ALL ER 769.

in a different country. Any parties considering a contract with a country such as R'as Al Khaimah should be aware of the type of interference carried out by national courts. This points out the need to do a careful forum shopping and to be extremely cautious when dealing with the parties from that part of the world.

When a party goes before a national court despite an arbitration going on, the rationale behind such an action can be the need for assistance from national courts i.e. for interim or conservatory measures, for the enforcement of the arbitrators' decision due to their lack of coercive powers. Another type of reason can be a dilatory action by one of the parties who refuses to take part in the arbitration ; so this party tries to obtain from a national court a decision whereby the arbitration would be stayed because the arbitration agreement is not valid, or does not exist. In such a circumstances, the party failing to participate in the arbitration is looking for a good reason not to go on with it, and the ground used then is the non-existence or the non-validity of the arbitration agreement¹²².

Chapter 2 : The Relationship between national courts or institutional body and arbitration during arbitral proceedings

National courts may intervene in support of arbitral proceedings in order to assist with the challenge and removal of arbitrators; with the extension of deadlines for rendering arbitral awards; the extension of time limits for arbitral proceedings; and to assist arbitrators with their lack of coercive powers. The four situations will be considered in the light of the legislation and rules under study.

¹²²*Marc Rich & Co.A.G v Societa Italiana Impianti P.A (The Atlantic Emperor)* 1 992 Lloyd's Rep. 624. In that case, the disputes arose from the sale of crude oil to *Marc Rich*. The contract for sale was negotiated in Italy. The disputes related to an allegation that the cargo was contaminated with water and that the contract incorporated an arbitration clause in the underlying contract. *Marc Rich* initiated the arbitration and appointed its arbitrator, while *Impianti* refused to participate. *Marc Rich* went before the Commercial Court in England seeking an appointment of an arbitrator pursuant to the 1950 Act. *Marc Rich* obtained leave to serve the summons out of the jurisdiction. *Impianti* went to the Italian court in Genoa, the *Corte di Cassazione* took the view that there was no binding arbitration agreement between the parties. The case went before the English Appeal Court and the ECJ, at the end, the English Appeal Court concluded that the decision from the Italian court was binding upon *Marc Rich*.

Part 1 : The challenge and removal of arbitrators

The difficulty of the duty to disclose events, relationships or facts which may undermine the parties' trust lies in the fact that arbitrators have to choose which facts they deem important and relevant enough to disclose. The choice of events, relationships or facts potentially undermining the parties' trust lies with arbitrators. They have to delve into their memory in order to find the relevant facts. Such a choice may be difficult. Imagine a practitioner, who many years ago, bought and retained some shares in a company. Twenty years later, the same practitioner has been appointed to act as an arbitrator. What shall he disclose ? Should he disclose such a fact ? Yes, he should. Imagine a practitioner, who many years ago, gave an opinion and assessed the quality of the chocolate truffles made by company A. Later company A was bought by company B. Should the practitioner, appointed by party B in an arbitration, mention this fact ? Yes, he should. To be on the safe side, practitioners should mention every single fact which could involve one of the parties to the arbitration, because silence is usually treated as giving rise to suspicion. Such a type of disclosure may lead to an amazingly long list of facts.

With the duty to disclose events, relationships or facts which may undermine the parties' trust in the appointed arbitrators, the opportunities for challenge have been reduced. But challenges may still occur¹²³. Challenging arbitrators is often used as a manoeuvre designed to obtain a tactical advantage over the opponent party. The tactical challenge usually aims at delaying or disrupting the good functioning of an arbitration, because a party feels unhappy with the idea of an arbitration or because its counsel believes it to be a good tactic. Well founded challenges do happen.

The grounds for challenge are quite similar in the legal systems under study. A particular insistence on the grounds giving rise to justifiable doubts as to independence and / or impartiality is found in every system of law¹²⁴. The reference to the lack of

¹²³ A dramatic increase of challenge has nonetheless being remarked. Several reasons would explain it. See VAN DER BERG in *THE ARBITRAL PROCESS AND INDEPENDENCE OF ARBITRATORS* 1991 p87-88. However the rigorous implementation of the duty of disclosure and its correlative statement of independence by the ICA has fairly reduced the number of challenges. See G. AGUILAR-ALVAREZ in *THE ARBITRAL PROCESS AND INDEPENDENCE OF ARBITRATORS* 1991 p64

¹²⁴ In England, section 24 of the 1996 Arbitration Act says that the court can remove arbitrators for circumstances giving rise to justifiable doubts as to their impartiality, if they do not possess the qualifications required by the arbitration agreement, if they are incapable or mentally incapable of conducting the proceedings, and if they have refused to properly conduct the proceedings or to use reasonable despatch in conducting the proceedings or making an award. In France, in accordance with article 1463§1 NCPC. One has then to go to article 431 NCPC in which grounds for challenge are

independence and / or impartiality being discovered by one of the parties after the arbitrators' appointment and during the course of arbitral proceedings is constantly used and is spelled out in more or less similar terms. In some legislative texts and rules, there is only one requested quality : either impartiality or independence¹²⁵. The drafters of these texts either considered that the chosen quality also covered the other quality¹²⁶ or because the content of impartiality was not sufficiently settled and its introduction could be detrimental to the ICC Rules¹²⁷. Another ground, often found, relates to the lack of proper qualifications for arbitrators. The parties may have expressly selected arbitrators for their alleged qualification or expertise in a particular field. If in the course of arbitral proceedings, one party discovers that the arbitrators do not possess the requested qualification and / or expertise, that party was deceived in appointing its arbitrators in the light of their potential qualification and / or expertise.

Challenge of arbitrators in France

Article 1463 NCPC stipulates that arbitrators may not decline to act or be challenged except for grounds revealed or having arisen subsequent to their appointment. A party is allowed to challenge arbitrators only if it has discovered after their appointment that they do not have the required qualities of independence and impartiality and on the grounds listed in article 431 NCPC. When difficulties arise, they are dealt with by the TGI of Paris which has an exclusive jurisdiction. For international arbitrations, no specific reference is made in the 1981 decree. It should be concluded that article 1463 NCPC therefore applies in a complementary manner. In other words, the TGI can rule upon the challenge of an international arbitrator. Its action is the tangible proof of the complementarity between national courts and arbitration.

The judge may refuse to consider an appeal in an institutional arbitration where the challenge has already been decided by an arbitral institution in conformity with its

listed. The grounds are similar to those applying to challenge of judges. The reference is also made to the circumstances giving rise to justifiable doubts as to impartiality and independence (Please refer to Appendix 4). Under the 1988 ICC Rules article 2§8 stipulates that the arbitrators may be challenged 'for an alleged lack of independence or otherwise' and article 7 of the 1998 Rules. And article 11 of the 1998 Rules. The grounds of challenge are under the Model law are spelled out in article 12 : 'arbitrators may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence or if they do not possess qualifications agreed to by the parties'.

¹²⁵I.e. the ICC with only independence and the 1996 Arbitration Act with only impartiality

¹²⁶For the 1996 Arbitration Act, the drafters were of the view that impartiality also covers independence.

¹²⁷S. BOND The experience of the ICC in the confirmation / appointment stage of an arbitration in THE ARBITRAL PROCESS AND INDEPENDENCE OF ARBITRATORS 1991 p11

rules. In *the Republic of Guinea* case, the parties appealed the challenge decision of the Chambre Arbitrale de Paris. The claimant refused to accept the institutional decision on the ground that the chairman of the institution had no jurisdiction since he was the challenged arbitrator. The TGI believed that the decision was taken in conformity with the general principles of natural justice¹²⁸. It held that since the parties had chosen the Chambre Arbitrale de Paris as the body in charge of organising their arbitration, and since they had accepted its rules, the institutional decision could not be appealed.

The challenge procedure under French law is the procedure set forth in articles 344 NCPC to 355 NCPC (with the exception of article 349 NCPC)¹²⁹.

Challenge within the ICC framework

Article 2§8 of the 1988 Rules permits challenge 'for alleged lack of independence or otherwise'. The grounds for challenge may be compared to the condition that triggers the duty to disclose the existence of 'any facts or circumstances which may be of such nature as to call into question the arbitrators' independence in the eyes of parties'¹³⁰. The question of independence from the parties is not the only source for challenges¹³¹. The mere existence of circumstances giving rise to doubts is enough to make a challenge effective. The parties must lodge their demand within a 30 day time limit after having discovered these circumstances. In their statement, they must specify the grounds that they will rely on. A copy will be sent to the challenged arbitrator and to the other party.

Under article 2§9 of the 1988 Rules and article 12§3 of the 1998 Rules, the Secretariat invites the interested persons¹³² to submit their comments and their views on the challenge. The Secretariat asks a member of the ICA to prepare a report in

¹²⁸Interlocutory order of TGI of Paris, 23rd June 1988 in Rev. Arb.1988. 657 comment Fouchard

¹²⁹ Please refer to Appendix 4.

¹³⁰Under article 2§7 of the 1988 Rules and article 11 of the 1998 Rules

¹³¹During my internship, there was a challenge based upon the fact that the chairman of the arbitral tribunal granted an extension to the claimant to file its arguments and submit its proof even though the initial procedural order by the arbitral tribunal had foreseen that pleadings were to be exchanged simultaneously. The request for an extension was made so late by the claimant, and was not communicated by fax to the defendant that by the time the chairman granted the extension, the defendant had already sent off its pleadings and documents to the claimant counsel, who then prepared his brief with full knowledge of the proof which defendant was producing. This challenge was rejected by the ICA. In general, challenge based upon the conduct of proceedings by arbitrator has usually been rejected by the ICA. The ICA practice shows that such a ground does not question the independence of arbitrators.

¹³²The challenged arbitrator, the other members of the arbitral tribunal and the other parties.

which the grounds will be examined¹³³. In the light of these data, the ICA will rule upon the challenge without making public its reasons.

The confidentiality of its reasons has been criticised¹³⁴ but dismissed by S. Bond (then the Secretary General) in saying that no international institutions communicate the reasons for rulings on challenges.

ICA decision may be appealed before national courts. French courts accept jurisdiction to rule upon its decisions but only within certain limits, as they are only prepared to check if the ICA has correctly implemented its rules. An example is provided by the *Raffineries D'Homs* case¹³⁵ where the courts recognised the jurisdiction of the institution to deal with challenge as long as the institution in question carries out the challenge in conformity with its rules¹³⁶.

The challenge procedure under the 1998 version of the Rules is similar to the 1988 version of the Rules¹³⁷.

Challenge of arbitrators under the Model Law

Article 13 of the Model Law establishes the challenge procedure. The first paragraph recognises the freedom of the parties to agree on a challenge procedure. The second paragraph provides a supplementary procedure, should the parties fail to agree on their challenge procedure. The parties must raise the issue within the fixed deadline of 15 days of becoming aware of a cause for challenge, and send a written statement to the arbitrator. If the period has elapsed, the party will be considered as waiving its

¹³³In a report the member of the ICA will firstly consider whether the challenge was time barred in consideration of the sequence of events from the introduction of the request for arbitration, the confirmation of the arbitrator. The arguments of the challenge will be discussed. Finally he or she will give his or her opinion whether the ICA ought to accept or refuse the challenge in question.

¹³⁴The ICA does not make public the norms it applies on the theory that no precedents should be created in the field and that every decision must be based on the particular facts of each case'. The view was taken that the parties should know why their challenge is refused, and on the ground that the ICA should have a moral duty to contribute to the development of the law. J. GILLIS WETTER The present status of the International Court of Arbitration of the ICC : an appraisal 1 Am. Rev. Int. Arb.1990 p91 at 100

¹³⁵*Raffineries Pétrole D'Homs et de Banias v Chambre de Commerce International*, 15th May 1985 in Rev. Arb.1985. 147

¹³⁶Attendu qu'ayant régulièrement procédé suivant la règle commune que les parties se sont volontairement imposées, la Cour de la CCI ne saurait se voir imputer à faute la décision d'avoir ouvert la voie menant au remplacement d'un arbitre dont le maintien au sein du collège arbitral a pu ne plus lui paraître fondé sur un consensus suffisant des parties'. 'La demande tendant à l'annulation de la décision de la Cour d'Arbitrage ne peut qu'être déclarée irrecevable sans qu'il y ait lieu de rechercher ou non un caractère juridictionnel, ni d'examiner les autres moyens proposés qui sont tous inopérant dans le cadre d'un arbitrage international.' in Rev. Arb.1985. 147 at 151

¹³⁷Article 12§3 of the 1998 Rules

right to challenge. No further challenge can be raised thereafter¹³⁸. The challenge is firstly directed towards the arbitrator who will examine it. The decision rests in their jurisdiction : either the challenged arbitrator refuses to withdraw from office or may agree to go.

The third paragraph gives a compromise solution¹³⁹ between immediate resort to court after denial of the challenge by arbitrators¹⁴⁰ or by another body and resort to court only after the award has been rendered¹⁴¹. The opposed suggestions varied very much because the participants disagreed as to the scope of the court's intervention. The compromise solution provides for an immediate court review of the unsuccessful challenge but with three restrictions : namely proceedings must be taken within a 30-day limit of notice of the decision rejecting the challenge; no appeal of the court decision is competent; and the arbitrator retains the power to proceed and make an award while such court proceedings are pending. These three features aim at reducing the risk of dilatory challenges.

The practice of the Iran-US Claims Tribunal¹⁴² shows that, despite all the precautions that were taken, dilatory challenges were invoked fairly often¹⁴³. The series of challenges illustrates the distinction between circumstances that must be disclosed and circumstances that justify disqualification¹⁴⁴. The parties were able to abuse their right to challenge because they distorted the rules in relying on the 'mere likelihood'¹⁴⁵ of such doubts rather than upon their real existence. This shows how delicate and unsettled the border line is.

¹³⁸Or parties will have to wait for the rendering of the award and their possibility to challenge it.

¹³⁹HOLTZMANN & NEUHAUS 1989 p407

¹⁴⁰Which would avoid delays and controversy consequent to proceedings being conducted by a challenged arbitrator HOLTZMANN & NEUHAUS 1989 p407

¹⁴¹Which would avoid dilatory tactics HOLTZMANN & NEUHAUS 1989 p407

¹⁴²With the UNCITRAL Arbitration Rules. Article 10 of the rules regulates the challenge of arbitrators whereby an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

¹⁴³which, consequently, led to a substantial turnover among arbitrators. ABERCROMBIE BAKER & DAVIS 1992 p37

¹⁴⁴The most telling and disruptive challenge occurred in 1988 when Iran launched several challenges against Judge Briner on the ground of his continued participation in the pending case of *Amoco Iran v NIOC* (documents available in volume 55 Iran-US. CTR 175). Iran felt that Judge Briner had not properly disclosed his professional connections with the party's expert witness and this failure would justify his disqualification from that case. Judge Briner refused to withdraw and his decision was supported by the US and the US claimant. In the end, Judge Briner resigned from the *Amco Iran* case in order to avoid further disruption in the functioning of the Iran-US Tribunal. ABERCROMBIE BAKER & DAVIS 1992 p49

¹⁴⁵ABERCROMBIE BAKER & DAVIS 1992 p 49

Conclusion

Most statutes and rules of arbitral institutions encompass the challenge within their framework. The procedures are usually set forth in detail if the parties have failed to agree upon it or simply because arbitral institutions want to decide this issue within their framework. Several situations are possible. The degrees of freedom given to arbitrators may differ from one country to another. If a wide liberty is granted to arbitrators, the national courts' intervention will be restricted.

On the one hand, challenge is decided by national judges. Most national legislation authorises challenges during the arbitration before national courts. The system essentially prevails for *ad hoc* arbitrations and for arbitrations which are governed by a specific substantive law. On the other hand, challenge is decided by an institutional body for institutional arbitrations. For such arbitrations, most institutions enable the permanent body to decide on challenges within its own framework. For such type of arbitrations, challenge can either be exclusively decided by the institution with a possible recourse to national courts against the institutional decision on the challenges or it can be carried out by means of a two-level procedure whereby the permanent body firstly decides challenge and later national judges have their say. The further recourse to national judges happens if the parties refuse the institutional decision, and if they want to appeal its decision in the hope of obtaining a decision more to their liking. In the latter case, a difficulty arises as to the existing relationship between the institutional decision and the control exercised by national judges.

The difficulty relates to its acceptance or not by a national judge. Would national judges follow that decision ? Would they question it on a regular basis ? Arbitral institutions are at liberty to decide challenges according to their rules and within their framework. If they are well known and well established in the field of arbitration with long standing experience, there is no doubt that national judges would follow their decisions and would only check that the decision was taken in conformity with the institution's rules. Recourse to national judges would then provide the parties with an assurance that the challenge had been decided according to the rules. The national judges' intervention usually amounts to a control over the implementation of the internal rules of arbitral institutions. The method of an examination *de novo* by national courts should also be seen as a positive advantage because it will consequently reduce the parties' tendency to challenge the final award. The only

inconvenience of such a procedure is that it can be a source of difficulty and of delays¹⁴⁶.

The removal of arbitrators in England

In England, the term 'challenge' is not used, but the term 'removal' of arbitrators is used in statutes and authorities.

Several situations are possible in relation to the revocation of the appointment of arbitrators¹⁴⁷ and the removal¹⁴⁸ of arbitrators under the 1996 Arbitration Act. The appointment of arbitrators can be revoked by the parties acting jointly or by an institution or person vested by the parties with such a power. The revocation¹⁴⁹ must be jointly agreed by the parties, in writing. The arbitrator can either be revoked by the parties acting jointly or removed by the court. Under section 18§3, the court can revoke any appointment of arbitrators already made. The power was introduced to allow the court to redress the balance when one party had imposed upon it an arbitrator chosen by a third party whereas the other party chose its own¹⁵⁰.

Section 24 of the 1996 Arbitration Act covers the power of the court to remove an arbitrator at the request of only one of the parties to the arbitration. By contrast with the prior law, it sets out separately and in greater detail the grounds upon which the court may exercise its power.

The grounds for removal and for revocation of appointment¹⁵¹ have dramatically changed. The 1996 Arbitration Act set out in more details the grounds upon which an arbitrator can be removed. It also distinguished consensual removal under section 23 and non-consensual removal by the court under section 24.

Six grounds are now available : justifiable doubts of the parties as to impartiality; the lack of required qualifications; the inability to conduct the proceedings due to physical or mental incapacity; the failure to properly conduct the proceedings; inability to conduct the proceedings with reasonable dispatch; and substantial injustice. Lack of independence is no longer a ground for revocation or

¹⁴⁶VAN DER BERG in THE ARBITRAL PROCESS AND INDEPENDENCE OF ARBITRATORS 1991 p91

¹⁴⁷Under section 23 of the 1996 Arbitration Act

¹⁴⁸Under section 24 of the 1996 Arbitration Act

¹⁴⁹On the grounds specified in section 24 of the 1996 Arbitration Act

¹⁵⁰It was inserted to ensure a fair treatment of the parties following the *BKMI Industrieanlagen v Dutco* case, where one party chooses its own arbitrator and the other has an imposed by court arbitrator.

¹⁵¹Stipulated in section 24 of the 1996 Arbitration Act

removal of the appointment¹⁵². This omission is deliberate on the part of the DAC. The DAC considered justifiable doubts as the independence as well as the impartiality of an arbitrator as ground for his removal. The DAC was not persuaded that in consensual arbitration this is either required or desirable¹⁵³. Lord Donaldson pointed out on 2nd reading that any requirement of independence would run counter to the English long established procedure whereby each party appoints its own arbitrator; in such a case the only issue is whether the arbitrator has acted impartially irrespective of whether or not he is independent in the full sense of the word¹⁵⁴. The other grounds relate to the duties that arbitrators should comply with to ensure the good functioning of arbitral proceedings, to exercise all powers conferred on them with fairness and impartiality between the parties. Once it has been established that arbitrators have failed to comply with the relevant duties in their conducting of the case, the party must also show that substantial injustice has been committed in order to justify their removal. Before initiating such an action, the party must firstly exhaust any available recourse to any arbitral institution where appropriate as stated in paragraph 2. This provision aims at preventing a party from prematurely making an application for removal. Paragraph 3 aims at preventing a party from taking dilatory action before the court with spurious and non-existing grounds. As arbitrators are allowed to continue with the proceedings to make a final award, there is now no reason for a party to abuse the removal process and the provision should discourage any party wishing to do so.

An attractive feature of the 1996 Arbitration Act is the 'death of misconduct'¹⁵⁵. The technical or other misconduct of arbitrators is not a ground for challenge anymore. This is a major change in the law since it was often used in practice to justify the challenge of arbitrators. It is undoubtedly an improvement in the 1996 Arbitration Act because misconduct was never firmly defined nor understood, and its implementation always proved to be hazardous. Such a change will certainly attract users, because it has been replaced by a more user-friendly ground.

The court will then make its order. According to the provision, the challenged arbitrator is given the opportunity to defend his position before any decision is taken whereas in the case of revocation of appointment, it does not seem that he is accorded

¹⁵²Contrast the Model Law, the ICC Rules, French law which require independence as a necessary quality for arbitrators. Its lack or any justifiable doubts as to independence in the eyes of the parties will give them grounds to challenge or to remove arbitrators.

¹⁵³DAC 1996 Report § 101 p26

¹⁵⁴MERKIN R. chapter 21 p42

¹⁵⁵HARRIS & PLANTEROSE & TECKS 1996 p9

an opportunity to defend his position. This is an interesting development, as arbitrators will have the opportunity to defend their position and their position will be safeguarded. This is also a positive asset for the 1996 Arbitration Act.

The removal of arbitrators in France

Article 1462§2 NCPC stipulates that arbitrators may not be dismissed or removed except with the parties' unanimous consent. If one party only wants the arbitrator to be removed, its demand will not be successful¹⁵⁶. One party alone cannot obtain their removal, both must agree. The grounds are not stated in the decree, but it may be concluded that all reasons can be used and above all the fact that they cannot fulfil their function. The ground for removal in France should not be ill-founded¹⁵⁷. If both parties agree¹⁵⁸ to the arbitrator's dismissal and if the ground for removal used by both parties is well founded and reasonable, the arbitrator will be dismissed.

Article 1462§1 NCPC said that arbitrators must continue their mission until it is completed. This should be understood as follows : their abstention and their non-participation should be interpreted as wrongdoing and be treated as a ground for removal. Thus, any refusal to act, or to take part in the proceedings or deliberations and award-making should be interpreted as a ground for removal. Here the abstention of arbitrators is strictly dealt with and the parties will be entitled to revoke their appointment and initiate another action to obtain damages¹⁵⁹. If nothing is said in the arbitration agreement, their removal and their abstention will put an end to the arbitral proceedings unless there is a contrary agreement between the parties in accordance with article 1464 NCPC. If the situation has previously been contemplated, the provisions dealing with the appointment of arbitrators should be followed and a substitute arbitrator should be appointed. Article 1462 NCPC does not mention the intervention of national courts to deal with difficulties relating to it¹⁶⁰.

¹⁵⁶If one party only wants the removal of an arbitrator, it will have to wait for the completion of the arbitration and the rendering of an award to bring an action to set aside the award.

¹⁵⁷ROBERT & MOREAU 1993 p125

¹⁵⁸Contrast the situation in England : the first school of thought believes that if both parties agree to remove an arbitrator, such an agreement will be sufficient to have the arbitrator removed. The second school of thought believes that by appointing an arbitrator two contracts are necessary i.e. one for the agreement of between the parties and the second one for the arbitrator's acceptance. The second contract cannot be broken unless the arbitrator agrees to resign. In practice, when both parties agree to remove an arbitrator, this is sufficient enough to have him removed.

¹⁵⁹ROBERT & MOREAU 1993 p123

¹⁶⁰Contrast the situation in England, where the courts may intervene to remove an arbitrator even if there is no agreement between the parties and for any ground.

The national courts' intervention is encompassed in article 1457 NCPC, and it does not suggest the national courts' intervention for article 1462 NCPC but only for article 1463 NCPC dealing with the arbitrators' challenge. Consequently, any difficulties in relation to the arbitrators' dismissal should be solved by the parties without national courts' intervention. If the difficulties cannot be overcome by the parties, they may still want to refer their misunderstandings to national judges who in the end will have an entire discretion to refuse to intervene, since there is no legal basis for such an intervention.

A criticism which can be made of the French legislation lies in the impossibility for two parties who have agreed to have the arbitrator removed unless they base their demand upon a ground acceptable to the arbitrator that the parties wish to have removed. Without a good reason, the agreement between the parties will not be sufficient to obtain the arbitrator's removal. Then the parties will have to wait for the rendering of the award to set it aside. In a situation where one party only wants the arbitrator to be removed, it is obvious it will not obtain the desired removal. This party will have to wait for the end of the arbitration and the rendering of the award to be able to set it aside.

The removal of arbitrators within the ICC framework

Under article 2§11 of the 1988 Rules or article 12§2 of the 1998 Rules, arbitrators can be replaced when it has come to the ICA's attention that arbitrators are *de jure or de facto* prevented from fulfilling their function, or that they are not fulfilling their functions within the rules or within the prescribed time limits. The ICA's ability to remove arbitrators is a strong weapon to combat unacceptable delays, the misconduct of arbitrators¹⁶¹ and the wrongful actions of arbitrators who fail to take the necessary measures for the good functioning of the arbitration.

¹⁶¹The meaning of misconduct has been clarified by Craig and co-authors when they state the standards of conduct for arbitrators during the proceedings : 'an arbitrator communicating with a party in writing should address a copy of the communication to the other party, the other arbitrators and the Secretariat of the Court, an arbitrator should not discuss the merits of the case or receive evidence or legal argument from a party in the absence of the other party and his fellow arbitrators if any, an arbitrator may communicate with a party regarding the fixing of procedural dates or practical and material aspects of the arbitration, but the contents of such communication should immediately be made known to the other party and arbitrators, an arbitral tribunal should generally allow the parties to modify or adopt procedural rules including ones that may be reached in the course of proceedings, an arbitrator should not discuss the merits of the arbitration with another arbitrator in the absence of the third arbitrator, unless the latter has agreed and is informed of the subject of the discussion'. CRAIG & PARK & PAULSSON 1990 p240

The removal of arbitrators would happen in situations¹⁶² where an arbitrator would be unable to perform his mission; where an arbitrator would constantly delay the arbitration without good reason forcing the ICA to grant numerous extensions; where an arbitrator would directly write to the parties to criticise the manner in which procedural decisions had been made by the other members of the arbitral tribunal¹⁶³. But an arbitrator would rarely be removed for procedural misconduct.

The information may come from a party, from one of the other members of the arbitral tribunal, from a third party or through the ICA's own observation. The rule provides for a written notice to be given to the parties and to all members of the arbitral tribunal. Within a suitable time, the parties and the members of the arbitral tribunal are expected to comment on the matter and their comments should be sent back to the Secretary General. The final decision belongs to the ICA which has complete discretion and a substitute arbitrator should be appointed according to the normal appointing procedure seen above.

The 1998 Rules¹⁶⁴ list the situation where arbitrators will be replaced, i.e. death, or resignation, or challenge, or upon request from the parties and on the ICA's own initiative. A similar procedure is proposed. An interesting point is the fact that the 1998 Rules authorise a truncated tribunal when the arbitration process has reached the closing of the proceedings. This novelty will authorise the ICA to avoid appointing another arbitrator, and therefore it will gain time.

The removal of arbitrators under the Model Law

The Model Law also proposes, in article 14, the removal of an arbitrator who 'becomes *de jure* or *de facto* unable to perform his functions, or who fails to act without undue delay'. Three grounds are specified for terminating the arbitrators' mandate. A difficulty may arise with the meaning of the phrase 'fails to act'. To avoid controversy concerning any of these grounds, it is wise to look at the Secretariat's commentary which provides useful guidance¹⁶⁵. It has been decided that insistence on

¹⁶²Research done during my internship. These situations were cases where the arbitrator was removed by the ICA.

¹⁶³SCHWARTZ in STATUS 1995 p67 at 84

¹⁶⁴Article 12 of the 1998 Rules

¹⁶⁵The commentary says 'which actions were expected or required of him in the light of the arbitration agreement and the specific procedural situation ? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case ? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what is reasonably be expected from an arbitrator ? Amongst the factors influencing the level of expectations are the ability to function

the time element was a major factor¹⁶⁶ that should be underlined. Moreover, three methods of terminating are also presented.

National courts' intervention, contemplated in article 14, will be necessary if a controversy arises as to the termination of the arbitrators' mandate. This may occur if they refuse to withdraw or if parties are unable to agree upon the termination of their mandate. If a controversy is encountered, this implies that the party initiating the removal has been unsuccessful in explaining its view to the other or the other party refuses to go along with the challenge. If so, national courts or another authority will rule upon the matter without a possible appeal for the parties.

The experience of the Iran-US Claims Tribunal shows that great difficulty may arise when arbitrators refuse to participate in arbitral proceedings and especially when they refuse to withdraw. The parties and other members of the arbitral tribunal are faced with a disturbing situation where they are depending on a person who may refuse to participate in deliberations without legitimate reasons or who may refuse to proceed with an award. Since the work of the Iran-US Claims Tribunal could not be undermined, the rules were slightly modified whereby the President of the arbitral tribunal could in consultation with the other arbitrators require the appointment of a substitute arbitrator¹⁶⁷. And article 15 of the Model Law provides for the replacement of arbitrators whose mandate has terminated. This appointment should be made in accordance with the rules governing the original appointment.

Conclusion

Both the ICC and the Model Law establish the right of arbitrators to comment on and defend their position before any decision as to their challenge is taken. In the other systems of law, such a right to comment on and defend their position is surely implied, although it is not mentioned. Such a right is certainly incorporated to avoid dilatory challenges and wrongly based challenges. French law is the only legal system which does not identify the national courts' intervention in the case of difficulties in relation to the removal of arbitrators. The others (the ICC, the Model Law and the

efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by agreement of the parties'. HOLTZMANN & NEUHAUS 1989 p439

¹⁶⁶The Commission decided to make [the time element] explicit, that is, the period of time during which the arbitrator should have acted but he did not.' The Commission believed that it was necessary for the time element to be pointed out since many national laws and arbitral rules contained a provision regarding the speed of arbitration. HOLTZMANN & NEUHAUS 1989 p439

¹⁶⁷ABERCROMBIE BAKER & DAVIS 1992 p58

English Act) send the parties back before national courts or before the institutional body if a controversy occurs.

The intervention of national courts at this stage will certainly have a positive influence on arbitral proceedings, and it will certainly avoid a further challenge of the final arbitral award.

Part 2 : Extension of deadline for rendering arbitral awards.

In relation to the extension of the deadline within which arbitrators should render their final award, national courts have a supportive role. Arbitrators are usually not vested with the power to extend such time limits. Therefore, it is quite common for national courts to assist them. Some differences between national laws and rules may appear as to the degree of freedom granted to arbitrators in referring to national courts. The parties usually have the power to request national courts to assist arbitrators.

Time extension in England

Article 50 of the 1996 Arbitration Act empowers the court, unless it has been otherwise agreed by the parties, to extend any time limit for the making of an award¹⁶⁸. It preserves the prior power granted to the court with significant changes pursuant to section 13§2 of the 1950 Arbitration Act. The 1996 Arbitration Act takes into account the parties' wishes. Failing an agreement between the parties, the court may enlarge the time for making an award. It is a non-mandatory provision. According to paragraph 2, arbitrators and the parties may apply for an order only after exhausting any other procedure available without recourse to the court. This situation would occur with an institutionalised arbitration : under the ICC Rules, for instance, the parties would have to refer to the ICA beforehand, and only if they are dissatisfied with its decision may they wish to proceed before national courts. According to paragraph 3, the court will grant the time extension only if satisfied that substantial injustice would result from the expiry of the deadline. So far it is unclear what the test involves. It has been said that, 'if the time expired due to successful delaying tactics of one party, or for other reasons beyond the control of arbitrators, time will be extended¹⁶⁹. The qualification was introduced to respond to the circumstances of institutional arbitration cases¹⁷⁰ whereby awards must be made within a definite period of time, and extension can be granted by the institutional body. Accordingly, recourse to national courts will

¹⁶⁸ The provision derives from the 1950 Arbitration Act (section 13§2).

¹⁶⁹ MERKIN R. chapter 21 p86

¹⁷⁰ Such as the ICC

be seen as a last resort alternative only to appeal the institutional body's decision. There are doubts about whether national courts will accept the appeal if the institutional body has complied with its own rules.

Time extension in France

Article 1456 NCPC provides for extension of legal deadlines. The president of the TGI or the TC may extend the time limit either at the request of the parties or at the request of the arbitrators. It is important to notice that both arbitrators and the parties may request the court to do so. In giving such a power to arbitrators, it has been recognised that it can be the best judge of whether or not the time extension is necessary.

In international arbitration, no specific provision expressly deals with the matter of time limit extension and therefore no rule regulates the question. If the parties have expressly chosen French procedural law, then article 1456§2 NCPC applies¹⁷¹. Therefore, the TGI of Paris has exclusive jurisdiction to extend the arbitrators' mission in time. The case law sheds some light on the matter. In some interlocutory orders (*ordonnances de référés*)¹⁷², the judge deemed that the scope of article 1456§2 NCPC should be expanded to international arbitration in order to extend the time limit for rendering awards as it was legitimate and appropriate even if arbitral proceedings have not been expressly referred to French law. The judge will have a complete discretion as to whether the time limit should be extended or not. And if he decides to do so he will be expected to stipulate the new deadline.

Time extension under the ICC Rules

Arbitrators have the duty to render their award within six months. However, this deadline can be extended by the ICA¹⁷³ either pursuant to a reasoned request from arbitrators, or if need be on its own initiative. Such an extension may be seen as a formality¹⁷⁴. It is true that the ICA normally gives an extension without the need of

¹⁷¹FOUCHARD in Rev. Arb. 1985. 46

¹⁷²*Sociétés Omnium de Travaux and Cart Trade Group v République de Guinée et autres*, interlocutory order, 12th January 1988 unpublished n=12835/87 and 12836/87 in Juris Class. 1066-1 1991. 17 and *Tribunal arbitral v Société Bachmann and République d' Irak* interlocutory order, 3rd June 1988 unpublished n=6102/88 in Juris Class. 1066-1. 1991.17 and *Irredelco International Corp. (USA) v Sociétés Etablissements M. Sebin et autres* interlocutory order, 6th July 1990 unpublished n=8136/90 in Juris Class. 1066-1. 1991. 17

¹⁷³In conformity with article 18.2 of the 1988 Rules. It would be the same under article 24.2 of the 1998 Rules.

¹⁷⁴REDFERN & HUNTER 1991 p392.

exceptional circumstances, since otherwise arbitral proceedings would be terminated. The counsel in charge of the case explains to the ICA the reasons for the extension in an agenda after having been in touch with arbitrators¹⁷⁵ ; therefore the ICA decision is taken in the light of the information given. Consider the situation where the parties come from different countries and continents, or where famous arbitrators with a heavy workload cannot find a suitable date for hearings before the six month deadline has elapsed. In such a situation, the ICA will have to extend the time limit right away.

The extension question will frequently be dealt with by a three-man committee of the ICA. A three month extension is usually granted unless the arbitrators can convince the Committee that a six month extension is necessary¹⁷⁶ or unless the ICA feels that a longer extension is exceptionally necessary on the ground that the case is stopped because of proceedings before national courts, or because a member of the arbitral tribunal is ill or unable to perform, for instance. Such a power has been characterised by national courts as an administrative power which is exercised according to the procedures accepted by the parties, and as long as the power is exercised within the scope of the rules, the time extension cannot be subject to judicial review¹⁷⁷. Consequently, national courts would not intervene or should not be requested to extend the time limit for rendering awards until after the ICA has dealt with it.

Time extension under the Model Law

The issue is not addressed by the Model Law. Since the Model Law does not consider the issue of the extension of the time limit for rendering an award, states adopting it were free to include a provision dealing with this matter if they deemed it appropriate.

For domestic arbitrations in Scotland, the court has no power to extend the time limits chosen by the parties in their arbitration agreement. Even if the parties agree, this will not change the fact that the court cannot extend the time limits. For that

¹⁷⁵During my internship, before the session of the ICA, I would get in touch with the chairman of the arbitral tribunal to have an up date of the case, to know why the arbitral tribunal needs an extension. The need for a time extension would usually arise because of special events such as the arbitrators waiting for an expertise, for the completion of proceedings before national courts or the need for an extension would be due to the death of one member of an arbitral tribunal. The need for an extension would also arise because the arbitrators would have other engagements and they would need further time to complete the drafting of the terms of reference or award.

¹⁷⁶CRAIG & PARK & PAULSSON 1990 p319

¹⁷⁷See Swiss decision of the Appeal Court of Bale, 2nd January 1984 in CRAIG & PARK & PAULSSON 1990 p319

reason, the parties usually do not choose any deadline in the arbitration agreement. The power generally lies within arbiters' hands.

Conclusion

In most cases, the extension of time for rendering the final award is exclusively carried out by national courts or by institutional bodies.

With the 1996 Arbitration Act, the parties have the power to exclude the court's power by agreement at the outset of the arbitration proceedings or in the arbitration agreement. The 1996 Arbitration Act allows the parties' freedom to remove the court's power, while French law does not allow opting out if French law has been chosen as the applicable law to govern arbitral proceedings.

Under French law, national courts have exclusive power to extend time limits.

The ICA will almost always grant such extension of time. Otherwise, it can be concluded that arbitrators may discuss the matter with the parties with a view to reaching an agreement, if it is authorised by the arbitration agreement or the legislation governing arbitral proceedings. If arbitrators cannot resolve the matter with the parties, they may be entitled to seek help from national courts, if they are authorised by the law governing arbitral proceedings to request the national courts' help. If arbitrators cannot go to national courts to obtain a time limit extension, then the arbitration may reach a deadlock. The parties may have to start again with a new arbitration or they may have lost their opportunity to have an arbitration.

Could national courts authorise the parties to go on with their arbitration in giving them a final time extension with a retrospective time limit extension ? If not, the parties may have to take their dispute to national courts and abandon their arbitration. Here, the choice of the *situs* for an arbitration is again underlined.

Part 3 : Extension of deadlines in general

Section 12 of the 1996 Arbitration Act grants the courts the power to extend time limits for the commencement of arbitral proceedings. It operates independently of the general power given to the court in section 79§1. A request for an extension can be made by any party to the arbitration agreement upon notice to the other parties, but only after exhausting any available arbitral process when the arbitration is under the rules of an arbitral institution. The tests to be applied are whether the courts are satisfied that unforeseen circumstances have arisen since the agreement of the parties

on the matter¹⁷⁸ and that one party has so conducted itself as to make it unjust to the other parties¹⁷⁹ to adhere to the original time limit.

Section 79 gives the court a general power to extend time limits¹⁸⁰, where they have been agreed by the parties or when such limits operate in default of the parties' agreement. According to paragraph 2, the extension of the time limit can be requested by any party to arbitral proceedings upon notice to the other parties and to arbitrators, or by arbitrators upon notice to the parties. The test to be applied by English courts is the exhaustion of any available recourse to the tribunal or to any institutional body with the power to do so¹⁸¹, and the existence of a substantial injustice if the time extension is not granted¹⁸².

Sections 12 and 79 are not linked. Under both articles, the courts' power to extend time limit is discretionary, and it may be granted even though the relevant time limit has elapsed. Its granting is conditional upon compliance with the tests imposed by each article. Under both articles, its granting should be exceptional. It is only justified by the occurrence of potential injustice to one of the parties. For both articles, the parties may exclude the courts' power to extend time limits.

Conclusion

The 1996 Arbitration Act is the only statute that considers the national courts' intervention to extend time limits other than the extension of the deadline for rendering arbitral awards. The Model Law, the ICC Rules¹⁸³ and French law do not provide for the national courts' intervention to extend general time limits for arbitral proceedings. If the national courts' intervention is not allowed, then such a power might be granted to the arbitrators, which may have the jurisdiction to extend general time limits for arbitral proceedings.

¹⁷⁸Circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision and that it would be just to extend the time' in section 12§3§a.

¹⁷⁹'The conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question'. in section 12§3§b.

¹⁸⁰Relating to arbitral proceedings for the appointment of arbitrators either for the sole arbitrator, the two arbitrators and the third arbitrators.

¹⁸¹'That any available recourse to the tribunal or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted'. in section 79§3§a.

¹⁸²'That a substantial injustice would otherwise be done'. in section 79§3§b.

¹⁸³The ICA however extends the time limit for the submission of the terms of reference and for appointing arbitrators if needed.

Part 4 : Assistance from national courts in supplementing the lack of coercive powers of arbitrators

Arbitrators have limited powers in comparison with those of national judges. Indeed they lack the powers of coercion that characterise judges' powers. The parties are not able to vest arbitrators with powers enabling them to compel the parties to the arbitration and especially third parties to do something, or produce documents and so on ; because the arbitrators' powers originate from the parties to arbitration and not from the state. The reason why arbitrators are lacking coercive powers to compel or order the parties to do something is obvious.

However, national courts may assist arbitrators in obtaining evidence or documents, in compelling or securing the attendance of witnesses. National courts are also expected to assist arbitrators in enforcing their peremptory orders if necessary.

The lack of coercive powers in England

In the 1996 Arbitration Act, the court may assist arbitrators in supporting arbitral proceedings according to sections 42, 43, and 44 of the Act.

Section 42 allows arbitrators and the parties to ask the court to enforce any peremptory order made by arbitrators, unless the parties have agreed otherwise. Under paragraph 2.a, the court may make orders in respect of the taking of evidence of witnesses. Under paragraph 2.b, the court has the power to order the preservation of evidence. The power embraces the use of the Anton Piller order which authorises the search of a party's premises and the seizure of materials found there but only when it is an emergency situation. Under paragraph 2.c, the court has the power to make an order in respect of property which is the subject-matter of the arbitration. The court's power extends to giving authorisation for entry into premises in the possession or control of a party to the arbitration. The court's power extends to property in the hand of third parties¹⁸⁴. The court's power is really complementary to arbitrators' powers because these latter are restricted to the property of the parties to the arbitration. Under paragraph 2.d, the court may order the sale of perishable goods¹⁸⁵.

Under section 43, a party to an arbitration, after having obtained the arbitrators' permission or the agreement of the other parties, may use the *subpoena* process¹⁸⁶ to

¹⁸⁴Such a power originates from Order 29 Rule 7A (2) of the Supreme Court Rules and section 34§3 of the 1981 Supreme Court Act.

¹⁸⁵The power arises from Order 29 Rule 4 of the Rules of the Supreme Court.

¹⁸⁶The court has the power under Order 39 of the Supreme Court Rules. For the form, issue and service of a writ of *subpoena*, the rules are found in Order 38 Rule 19 of the Rules of the Supreme Court.

obtain testimony or documents from a witness if he or she is situated in the UK, including Scotland. The witnesses' attendance may be compelled for the purpose of giving oral evidence¹⁸⁷ or for the purpose of producing documents¹⁸⁸. Under paragraph 2, a party may apply to the court for the exercise of the power with the permission of the arbitrators or alternatively with the agreement of the other parties¹⁸⁹. The power given to the court is similar to the prior power set forth in the 1950 Arbitration Act¹⁹⁰ with the only difference being the simplification of terminology used in the 1996 Arbitration Act. A new restriction is imposed for the application of the power, namely that the court will order the attendance of a witness residing in the UK only if the proceedings are conducted in England, Wales or Northern Ireland.

Under section 44, the court may make orders in order to facilitate the taking of the witnesses' evidence, to preserve evidence, to request the inspection, photographing, preservation, custody or detention of the property, to order that samples be taken from, or any observation made or experiment conducted upon property, to order the sale of any goods the subject of proceedings and to order an interim injunction or the appointment of a receiver¹⁹¹. The powers of the court are similar to those granted in the 1950 Arbitration Act. Their powers are concurrent with the arbitrators' powers, under section 38 of the 1996 Arbitration Act, with the exception of sale of goods. The court's powers are wider to the extent that they can exercise coercive powers towards the parties to arbitration and third parties whereas arbitrators cannot.

The powers considered above are subject to restrictions. The court's powers would only apply if arbitrators are unable to intervene effectively. If they have been vested with these powers, there is no reason for the complementary powers of the court to be applied. The parties should apply to national courts only if arbitrators are unable to exercise such powers, because they were not granted them, or because they are unable to carry them out.

¹⁸⁷In which case the procedure is known *subpoena ad testificandum* which term is not used in the 1996 Arbitration Act.

¹⁸⁸In which case the procedure is called *subpoena duces tecum* which term is not used in the 1996 Arbitration Act.

¹⁸⁹Under section 43§1 of the 1996 Arbitration Act

¹⁹⁰Section 12§4 and 12§5 of the 1950 Arbitration Act

¹⁹¹The assistance given by national courts during arbitral proceedings is similar to the granting of interim measures under the 1996 Arbitration Act.

The lack of coercive powers in France

In France, nothing is said in the 1980-81 decrees in this respect. The practice is to refer the matter to the TGI for assistance. The recourse to the TGI is a solution but it is contemplated with uncertainty. So far it has proved to be the only available solution, but it is still questioned¹⁹². It has been argued that the principal line of intervention by national courts has been to order judicially supervised expert reports¹⁹³ rather than to order discovery and production of evidence¹⁹⁴. However, it would seem that such recourse is not as straightforward as in common law countries. It is admitted that arbitrators can request the parties to produce documentary evidence and give testimonial evidence. If parties refuse to obey the arbitrators' request, it seems correct to say that arbitrators have a limited power to deal with it. They may be able to support their request with some kind of sanction like a day fine for non-compliance (*astreinte*)¹⁹⁵. As to third parties, arbitrators themselves cannot request the TGI's co-operation in order to obtain the production of documentary evidence held by third parties¹⁹⁶. If the parties feel that they need the TGI's assistance to ensure the good functioning of their arbitration (i.e. to obtain the production of documentary evidence held by third parties), they should apply to them.

It would seem that French courts may agree to help in the taking of evidence if this can ensure the good functioning of arbitral proceedings, even if there is not a particular enthusiasm in French courts to intervene during arbitral proceedings to assist with the taking of evidence.

The lack of coercive powers under the ICC Rules

Similarly, there is no specific provision in the ICC Rules dealing with the assistance of the ICA or of national courts in the taking of evidence or compelling witnesses' testimony. The fact that the ICA does not interfere at such a level is not surprising, since the ICA is a body with a clearly defined role, namely to 'ensure the application of the Rules of Conciliation and Arbitration of the International Chamber

¹⁹²E. LOQUIN Les pouvoirs des arbitres internationaux à la lumière de l'évolution récente du droit de l'arbitrage international in JDI 1983. 294 at 307

¹⁹³CRAIG & PARK & PAULSSON 1990 p 434

¹⁹⁴REDFERN & HUNTER 1991 p 309

¹⁹⁵The power of arbitrators to order a day fine is still questioned by practitioners. Some favour the granting of the day fine (Jarrosson in *ETUDES* 1991 p273). Others disagree with it (LOQUIN in JDI 1983. 294 at 308 and PERROT in *Rev. Arb.* 1980. 642).

¹⁹⁶B. GOLDMAN in *60 YEARS OF ICC ARBITRATION : A LOOK AT THE FUTURE* 1984 p257 at 278

of Commerce, and that the Court has all necessary powers for that purpose¹⁹⁷. The seat of arbitration for an ICC arbitration has importance since it should help to determine which national courts should be resorted to for help in the taking of evidence or in compelling witnesses' testimony. No generalisation is possible here, as it would depend on the national law rules. At this point, the importance of forum shopping appears. If the choice of the seat of arbitration is inappropriate, the lack of coercive powers of arbitrators will have dramatic consequences.

The lack of coercive powers under the Model Law

The Model Law provides for the assistance of national courts in taking evidence. Article 27 stipulates that arbitrators or a party, with the arbitrators' approval, may request from a competent court assistance in taking evidence. The article also stipulates that national courts may do so within their competence and according to their rules on taking evidence. The article aims at integrating domestic rules on court assistance without interfering too much with domestic laws.

The wording adopted by Scotland is slightly different in that arbitrators may request from the Court of Session or the Sheriff Court assistance in taking evidence and recovering documents. The obvious addition to the initial text relates to the specification of the court which will provide assistance. The other difference relates to the addition of the 'recovery of documents'. It was felt by the Dervaird Committee that a reference to assistance in taking evidence would include the power of the court to order recovery of documents in appropriate cases¹⁹⁸. It was felt that assistance in taking evidence embraced the recovery of documents and therefore its addition was necessary.

The Model Law provision is rather basic and leaves, consequently, domestic law free to deal with this matter. The impact of the Model Law on domestic law is here minimised and reduced to its simple expression.

Conclusion

As mentioned earlier in this part, the choice of the seat of arbitration has a great influence when national courts' assistance is needed to fill up the loopholes, i.e. the lack of coercive powers.

¹⁹⁷Statutes of the ICA, its article 3.

¹⁹⁸The Dervaird Report 1989 p15

If the parties have chosen a seat where the national law refuses the national courts' intervention, the parties will be facing a difficult situation, and arbitral proceedings might be endangered and a final award undermined by the lack of information available to arbitrators.

If the parties have selected a country where the national law encourages the national courts' intervention, their assistance in relation to the attendance of witnesses and the taking of evidence will be possible, and arbitral proceedings will be saved. The lack of coercive powers for arbitrators is here obvious during the course of proceedings.

Without coercive powers, arbitrators are limited in their actions. They can be seen as an unfinished copy of judges since they cannot enforce their decision. Consequently, the arbitrators' powers need to be completed and reinforced by national judges' assistance.

Arbitrators and national judges have a complementary role to play to ensure the good functioning of arbitration.

Part 5 : Interim measures during arbitral proceedings

Once arbitral tribunals have been constituted, and absent any complication such as the challenge of arbitrators, the parties may apply either to arbitrators or to national courts for interim measures. The ability of arbitrators depends upon the granting of such power to them. The choice lies in the parties' hands to vest them with such power or not when they negotiate their arbitration agreements. The other relevant consideration is whether statutes authorise arbitrators to have such power. If arbitrators are granted such power, the parties should apply to them for interim measures in the course of arbitral proceedings. Arbitrators may have been given such powers, but because of exceptional circumstances, such as a challenge, they are temporarily unable to function and cannot grant the required relief. If arbitrators are not vested with such power, national courts may assist the parties.

In principle, national courts should not interfere in the arbitration procedure, but they would certainly agree to intervene if they consider that the circumstances are

exceptional. Consequently, their role must only be exceptional, subsidiary¹⁹⁹ and justified.

Interim measures during arbitral proceedings in France

The national courts' intervention is dependent upon the nature of the interim measures requested by the parties.

For interim provision²⁰⁰, the *Cour de Cassation* held that national courts have no jurisdiction to order it even in the event of urgency²⁰¹, because it implies a consideration of the merits of the case during arbitral proceedings. In later cases, such a trend has been reaffirmed by lower courts and all requests for interim provision have been rejected because interim provision cannot be assimilated to measures that can be granted during arbitral proceedings²⁰² and because its granting involves the consideration of the merits²⁰³.

With regard to expertise, the national courts' intervention is accepted but it appears to be exceptional because interim measures relating to expertise are within the arbitrators' jurisdiction. Following this line of thinking, French courts may refuse to grant them because of the handling of the case by arbitrators²⁰⁴. However, if national courts deem that they have competence and order such interim measures, their action will be fiercely criticised²⁰⁵ for abusing their power and stepping over the arbitrators' jurisdiction.

¹⁹⁹PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES 1993 p72 at 89

²⁰⁰This is a provisional payment granted to the creditor against the debtor.

²⁰¹*Société Eurodif* case, *Cour de Cassation*, chambre civile 1, 14th March 1984, in Rev Arb. 1985. 69 comment Couchez

²⁰²'Le référé provision ne saurait être assimilé aux mesures provisoires ou conservatoires prévues par l'article 8§5 du Règlement CCI comme compatibles avec la poursuite de l'instance arbitrale. La demande de provision ne peut être portée devant le juge des référés alors que la procédure d'arbitrage est en cours.' *Société Engrais de Saint-Wandrille "E.S.W" v Société Trans Agricultural Investment "T.A.I"*, Appeal Court of Rouen, chambre civile 2, 7th May 1986 in Rev Arb. 1986. 565 at 566 comment Couchez and *Société Industrielle d' Acide Phosphorique et d'Engrais (SIAPE) v Société Industrie Engrais Commerce (IEC)*, Appeal Court of Paris, chambre 1A, 14th May 1986 in Rev Arb. 1986. 565 at 566 comment Couchez

²⁰³'L'appréciation de la demande d'une provision en application des dispositions de l'article 809 NCPC suppose l' examen du fond du litige pour vérifier le caractère non sérieusement contestable de l'obligation invoquée ; une telle demande ne peut être assimilée à celle d'une simple mesure conservatoire ; il s'ensuit que le juge des référés ne peut en connaître alors que la procédure d'arbitrage est en cours'. *Société Maeght v Société Galerie Maeght-Lelong*, TGI of Paris (interlocutory order), 21st February 1986 in Rev Arb. 1986. 565 at 566 comment Couchez

²⁰⁴PLUYETTE in CONSERVATORY AND PROVISIONAL MEASURES 1993 at 89

²⁰⁵*Société Maeght v Société Galerie Maeght-Lelong*, TGI of Paris, 21st February 1986 in Rev Arb. 1986.577 comment Couchez

With regard to measures for returning matters to their original state²⁰⁶, the national courts' intervention is accepted if their action is limited to a situation of urgency and risk. The possibility allowed to national courts has been confirmed in *République Islamique d'Iran v Framatome & Eurodif*²⁰⁷. The *Cour de Cassation* held that if the arbitration is in progress, the judge has to assess whether the claim justifies a conservatory measure on the basis article 808 on the ground of urgency or on the basis of article 48 of the CCP²⁰⁸ on the ground of urgency and if the recovery of the debt is at risk. The *Cour de Cassation* held that the assessment by the judge of the measure does not imply an examination²⁰⁹ of the merits, which is reserved to arbitrators.

To conclude about the intervention of French national courts during arbitral proceedings, it must be said that such intervention is conditional upon the nature of the requested measures. If the measures are only interim measures, national courts would most likely refuse to order them. If the measures are purely provisional and conservatory, national courts would certainly order them.

The courts' willingness to order conservatory measures is further dependent upon the circumstances of the case : if it can be shown that there is a total paralysis of arbitrators and they are powerless to fulfil their function, then national courts will undoubtedly have legitimate reasons to interfere in arbitral proceedings. The further conditions show that national courts do not intend to steal the arbitrators' jurisdiction, but will only intervene with a view to assisting arbitral proceedings and ensuring the enforcement of final awards.

Their intervention in the course of arbitral proceedings highlights the need for a harmonious equilibrium between respect for the arbitrators' jurisdiction and the need to respect the parties' will in choosing arbitration on the one hand and assistance where arbitral proceedings would otherwise be nugatory on the other hand. The only

²⁰⁶ Measures for preventing imminent loss or damages, for having manifestly illicit behaviour and measures guaranteeing the future enforcement of the award and so on.

²⁰⁷ *République Islamique d'Iran v Société Framatome et autres* and *O.E.A.I et autres v Eurodif et autres*, *Cour de Cassation*, chambre civile 1, 20th March 1989 Rev Arb. 1989. 653 comment Fouchard

²⁰⁸ Code of Civil Procedure

²⁰⁹ 'Mais attendu que cette appréciation de l'apparence n'implique pas un examen au fond, qui est réservé aux arbitres, qu'il en résulte que la Cour d'Appel, qui n'a pas dénaturé la convention, a pu estimer que cette saisie conservatoire était possible en cours d'arbitrage, d'où il en suit que le moyen n'est pas fondé'. *République Islamique d'Iran v Société Framatome et autres* and *O.E.A.I et autres v Eurodif et autres*, *Cour de Cassation*, chambre civile 1, 20th March 1989 Rev Arb. 1989. 653 at 655.

exception to the competence of national courts to order interim measures may arise from the parties stating otherwise in their arbitration agreement.

Interim measures during arbitral proceedings under the ICC Rules

Article 8§5 of the 1988 Rules provides that the parties may continue to have recourse to national courts to obtain provisional measures despite the constitution of arbitral tribunals and despite the transmission of the file to arbitrators. This implies that arbitrators should normally deal with any request for interim and conservatory measures. However, the parties may seek help from national courts if arbitrators are unable²¹⁰ to grant the relief required, or if arbitrators are unwilling to order the requested measures where the full amount of the advance on costs has not been paid²¹¹.

With the 1988 Rules, opposing and contrasting results were achieved. In some cases, the arbitrators took the view that they did not have jurisdiction²¹² to grant interim measures whereas in other cases they took the contrary view²¹³. The contrasting approach shown by arbitrators in ICC arbitrations arises from the circumstances of the case. It seems obvious that a decision rendered by national courts, especially by Appeal Courts, has great weight and great influence. When arbitrators are asked to overrule and alter such a decision, their refusal to satisfy the requesting party is obvious and cannot be criticised. If the consensual origins of the arbitrators' powers

²¹⁰Because of the challenge of an arbitrator or because arbitrators do not have the power under the rules governing the proceedings.

²¹¹SCHWARTZ in CONSERVATORY AND PROVISIONAL MEASURES 1993 at 55

²¹²In the case 3896 of 1982, one of the parties went before national courts to obtain measures, namely is a bank guarantee to ensure the payment of a sum of money (*caution bancaire*) while the arbitrators considered whether they had jurisdiction. Arbitrators took the view that they did not have the power towards third parties, in this instance a bank. The national court took the opposite view that arbitrators were able to order the measure requested by the party. ICC case 3896 of 1982 in JDI 1983. 914. In a similar case, arbitrators refused to grant the defendant's request because it would be a mistake to modify a measure already ordered by a state court ICC case 4998 of 1985 in JDI 1986. 1139. In a similar case, arbitrators felt that they did not have jurisdiction to modify the national decision previously given in a respect of a question that had been raised and decided as a preliminary matter. In the instance, the national court had refused to grant interim relief aiming at blocking the payment by the issuing bank of some performance guarantees. Arbitrators were asked by the same party to grant a similar interim relief and they were unwilling to overrule the national courts' decision. ICC case 4126 in JDI 1984. 934

²¹³In a case a party went, after the transmission of the file to arbitrators, before the national court in an Arab country to obtain orders attaching assets of the defendant party. Arbitrators had the power to make interlocutory orders under the ICC Rules. They also considered that the recourse to national court by the claimant to seek attachment was not of an exceptional nature. Consequently, they considered that the party should have directed its request to them and not to a national court. After finding that the claimant was not entitled to apply to the national court, they went further and requested that the claimant should waive the attachment obtained. SCHWARTZ in CONSERVATORY AND PROVISIONAL MEASURES 1993 p45 at 55

are considered, such a move can be understood. Where a request for interim measures involves the whole amount of the money at stake in the arbitration, arbitrators may deem that they do not have the power to order such interim relief. Again the arbitrators' attitude is certainly justified.

As to requests for interim measures concerning third parties, arbitrators are unable to order them because of their lack of coercive powers. Arbitrators are found to have the power, under the ICC Rules, to order interim measures or conservatory measures during the course of arbitral proceedings. If the request for interim or conservatory measures does not have consequences on the opposite party's assets or money, arbitrators should be able to grant it provided that the national courts did not refuse to grant it beforehand.

With the 1998 Rules, it is clearly specified that arbitrators may order interim or conservatory measures they deem appropriate and subject to appropriate security being furnished by the requesting party²¹⁴. The ICC would follow international practice. This would represent a major development. Firstly, national courts would lose their prerogative to order interim or conservatory measures and arbitrators would now have such a power. Secondly, the 1998 Rules provide answers to the puzzling situation whereby arbitrators had a contrasting approach according to the circumstances of the cases which arose due to the ambiguity of the text of the 1988 version.

Both the Model Law and the 1996 Arbitration Act deal with interim measures before and during arbitral proceedings in the same articles, respectively article 9 and article 44. With a view to avoiding repetition, the reader should refer to the parts dealing with it²¹⁵.

Conclusion

The need for urgent measures (either conservatory or provisional) during the course of arbitral proceedings highlights the concurrent power of national courts and arbitrators. Depending on whether or not arbitrators are vested with enough power to order interim relief, the need for recourse to national courts will occur. If arbitrators do not have the necessary power to order these measures, the parties should be able to seek a remedy from national courts.

²¹⁴Article 23§1 of the 1998 Rules.

²¹⁵In Title Three, chapter 2 ; interim measures before the constitution of arbitral tribunals.

The national courts' action will be to assist and support arbitral proceedings. Here again, the choice of the seat of arbitration has its importance. In looking for a potential seat of arbitration, the parties and their counsel ought to keep in mind the potential need to obtain urgent measures during arbitral proceedings.

Chapter 3 : The relationships between national courts and arbitration after the final award has been issued

As arbitral awards are the work of private judges, their awards do not have the same judicial character as decisions emanating from state courts²¹⁶. The purpose of the parties in commencing an arbitration is to obtain a binding decision in their favour, which will be implemented by both parties. Normally, the parties will comply with arbitral awards. Otherwise, there would be no point in initiating such a costly and time-consuming procedure²¹⁷. Both sides may be unhappy with the result of their arbitration, and they may consequently challenge the final award, using all sorts of grounds. Usually, one party only is displeased with the result of the arbitration because 'there is almost always a winner and a loser'²¹⁸. The successful party may expect the award to be performed as soon as possible; it is at this stage that national courts intervene.

Part 1 : Challenge of awards under English Law

The grounds of challenge are listed in section 68 of the 1996 Arbitration Act. . It derives from section 22 and 23§2 of the 1950 Arbitration Act and from article 34 of the Model Law. Section 68 is designed 'not to permit the court interference by setting out a closed list of irregularities (which will be open to the court to extend) and instead reflecting the internationally accepted view that the court should be able to correct serious failure to comply with the due process of arbitral proceedings²¹⁹. Application may only be founded on one of the grounds listed in section 68. The list is exhaustive and it encompasses a great number of cases :on the one hand, the courts should be able to find a suitable ground to fit the case and on the other hand, the court cannot invent

²¹⁶'La sentence demeurant en elle même un acte juridictionnel à l'état de simple écrit puisqu'émanant de personnes commises par les parties pour le faire est, certes, obligatoire en ce que celles-ci se sont engagées par la convention d'arbitrage à ce qu'elle n'est pas pour autant exécutoire.' ROBERT & MOREAU 1993 p187

²¹⁷For complex international cases in general.

²¹⁸REDFERN & HUNTER 1991 p417

²¹⁹DAC 1996 Report p59

more grounds to suit the case. The restriction imposed on courts is deliberate and aims at preventing the trend shown in recent cases whereby courts were overdoing it²²⁰. The courts' intervention for the setting aside of an arbitral award has been clarified and its limits have been set²²¹. The court's power is now essentially designed to be supportive. The extent to which the court may intervene is now limited to ensuring that an award is not affected by serious irregularities : if it is it will be set aside.

Section 68§1 is mandatory. According to section 68§1, a party to arbitral proceedings may apply to the court challenging an award upon notice to the other parties and to the arbitrators. The right to apply is subject to the waiver principle in section 73§1 and to the procedural requirements of section 70. An application must be brought within 28 days of the date of the award or the termination of an appeal process under section 70§3. The period can be extended by the court in accordance with its powers under section 79 of the Act²²². Before any challenge, the party should ensure that all available rights of recourse²²³ have been exhausted. And a party wishing to challenge an award should ensure that it has not lost its right to object in pursuance of section 73²²⁴. It is intended to oblige that parties to act very promptly. It should avoid dilatory challenges aiming at delaying the implementation of a contested award.

Serious irregularities relate to the failure by arbitrators to comply with their general duty, i.e. to act fairly and impartially and to adopt procedures suitable to the circumstances of the case, to avoid unnecessary delay or expense; failure to comply with their powers; failure to conduct the proceedings in accordance with the procedure agreed by the parties; failure to deal with all the issues that were put to it; uncertainty and ambiguity as to the effect of the award²²⁵; the award being obtained by fraud or

²²⁰ Previously courts were able to interfere with the arbitral process on any occasions. They were able to remit awards for reconsideration whenever they thought fit. They also remitted awards for further consideration of an argument not pursued before arbitrators in the case *Indian Oil Corporation v Coastal (Bermuda) Ltd* [1990] 2 Lloyd's Rep. 407.

²²¹ MERKIN R. chapter 21 p106

²²² MERKIN R. chapter 21 p106

²²³ That is the correction, the removal of clerical error or mistake and the making of an additional award. Section 57 says that the parties are at liberty to agree as to the powers of the arbitral tribunal either to correct an award or to make an additional award. Insofar as there is no such agreement, it gives powers to the tribunal that are more extensive than before.

²²⁴ Section 73 of the 1996 Arbitration Act intends to prevent the parties from delaying proceedings or avoiding the effect of an award by raising late objection to the arbitral tribunal as to the lack of jurisdiction and irregularity.

²²⁵ In the House of Lords at Committee stage, it was suggested to the DAC that the wording 'uncertainty or ambiguity of the award' might encourage attempts to challenge an award on the ground that the reasoning of the decision was uncertain or ambiguous. The DAC wanted to cover cases where the result of the award was uncertain and ambiguous. DAC Report 1997 p12. The original version of

contrary to public policy; and failure to comply with the requirements as to the form of the award and as to the conduct of the proceedings. The Act gives a detailed list of matters relating to serious irregularities which could give rise to a successful challenge to an award. The 1996 Arbitration Act replaces the ground of misconduct previously used²²⁶ with the more user-friendly expression 'serious irregularities'.

In section 68§3, three options available to the courts are listed : the power to remit the award to the arbitrators in whole or in part for reconsideration, the power to set aside in whole or in part the award and the power to declare the award to be of no effect in whole or in part. The provision offers far more flexibility that existed prior to the 1996 Arbitration Act. In former legislation, the court had the power to remit the award for reconsideration²²⁷ by arbitrators or the power to set aside the award²²⁸. The 1996 Arbitration Act offers an interesting combination of powers to courts. There is a rise in the strength of remedy available with remission, a declaration of no effect and setting aside. The choice between a declaration of no effect and the setting aside is most obvious. The present writer is left perplexed because of the difficulty of choosing between them and because no details are given on how to choose. It has been said that faced with a choice of remitting or setting aside, the court is to remit whatever it can and to set aside only where remission would not be appropriate²²⁹. It has also been said that if the award is remitted, it is likely that the same arbitrators will be retained. If by contract, the award is set aside or nullified but the dispute remains in arbitration, the court has the power to remove the arbitators under section 24 of the 1996 Arbitration Act²³⁰.

the provision was amended by the insertion of the words 'as to the effect'. The new wording 'uncertainty or ambiguity as to the effect of the award' is intended to reflect that ambiguities in the reasoning or other aspects of the award are not themselves serious irregularities. 'The Act is concerned only with the ability of the winning party to enforce the award, and what is required is that the obligations of the parties under the award are free from ambiguity'. MERKIN R. 1997 chapter 21 p108

²²⁶Section 23§1 and 23§2 of the 1950 Arbitration Act which did not provide a definition and it is easier to illustrate than to define. As Bernstein's Handbook says 'the courts have always refused to give an exhaustive definition of what constitutes 'misconduct' : the word is used to cover a range extending from fraud or other grave malpractice at one extreme to a mere procedural error at the other'. BERNSTEIN & WOOD 1993 at 206

²²⁷ Under section 22 of the 1950 Arbitration Act

²²⁸ Under section 23 of the 1950 Arbitration Act, which in the writer's opinion was not the best power given to the courts.

²²⁹ MERKIN R. chapter 21 p108

²³⁰ MERKIN R. chapter 21 p108

The 1996 Arbitration Act also draws an interesting distinction between early challenges to the substantive jurisdiction of arbitrators²³¹, challenges under section 67²³² and challenges dealt with in section 68 in respect of serious irregularities. The options left to the courts for the challenge of awards are now more open. It is another example of the positive philosophy of the 1996 Arbitration Act, which favours the assistance and the support of national courts towards arbitration rather than the old tendency of hampering arbitration.

Part 2 : Challenge of awards under French Law

Arbitral awards, to be executed, need a judicial decision from state courts, which is a judgement of *exequatur*²³³. With a view to transforming arbitral awards into an enforceable decision, French courts will undertake a rigorous review of arbitral awards rendered abroad or in international awards under articles 1498 to 1501 NCPC and with articles 1501 to 1507 NCPC, respectively, for means of recourse against foreign and international awards. Such a rigorous control is the compensation for the liberal approach adopted by French courts²³⁴. Awards rendered in France²³⁵ are excluded from article 1498 NCPC and the following articles. Domestic awards (those rendered in France) are more closely checked by French courts because the arbitration legislation is stricter for domestic arbitrations.

The control may occur in two situations, either for their recognition and their enforcement or when appeals against awards are made. The rules for recognition and enforcement are similar for both awards of an international nature and those rendered abroad. Nevertheless, the rules relating to an action to set aside awards are only applied to French awards because it is generally admitted that the courts of the situs

²³¹ These matters being dealt with in sections 31 and 32 of the 1996 Arbitration Act. Section 31 deals with the procedures available where there is a challenge to substantive jurisdiction of arbiters. Section 32 provides for the determination of a preliminary point of jurisdiction by the court, being one of the ways in which a challenge to the arbitrators' jurisdiction may proceed. The intention is to encourage the parties to adopt an alternative course and permit the arbitrators to rule on their jurisdiction pursuant to section 30 and 31.

²³² Section 67 provides for an application to court challenging an award insofar as it relates to the substantive jurisdiction of the arbitral tribunal.

²³³ A judicial authorisation to enforce the award. If this decision is granted to the party by a French court and the opposing party still wishes to prevent the arbitral award from being implemented, this party can try to have the arbitral award set aside. Nothing in the decree prevents a party to do that.

²³⁴ 'Soit la sentence rendue pour la remettre en cause ou encore prêter main forte à son exécution, finalité de la procédure'. CH & P. THIEFFRY L'évolution du cadre législatif de l'arbitrage international dans les années 1980 in 118 JDI 1991. 965

²³⁵ Which do not implicate the interests of international trade as in article 1492 NCPC.

are the only ones that have jurisdiction, to set aside arbitral awards if they do not abide by the requirements set forth by the legal system of the situs.

Arbitral awards must abide by several conditions to obtain recognition and enforcement. A single text, article 1498 NCPC, provides for the conditions. The material requirement implies that the existence of arbitral awards must be proven by the party relying thereon, by the production of the original text together with the arbitration agreement or copies with proof of their authenticity²³⁶. The documents must be translated into French, if needed, by a certified translator²³⁷. The legal condition for the recognition or enforcement is that arbitral awards must not be manifestly contrary to international public order. The enforcement judge will examine whether the two conditions have been complied with and, if so, will declare arbitral awards enforceable.

The decision granting enforcement will be given without an adversarial process and without a debate on the merits of the case. The enforcement judge exercises a simple *prima facie* control. Under article 1498 NCPC, he will merely verify that the arbitral award exists and is not manifestly contrary to international public policy. His role is only to check compliance with these two conditions and nothing else²³⁸. The requirement to produce the arbitration agreement implies that the enforcement judge checks that arbitrators had jurisdiction and that they dealt with disputes which are within the scope of the arbitration agreement. If an arbitral award is manifestly contrary to international public policy, then it cannot be integrated in the French legal system. Therefore, the power of the enforcement judge is limited to a *prima facie* verification and is only to grant or refuse the enforcement to an arbitral award.

Article 1502 NCPC stipulates five grounds under which recognition and enforcement may be refused : firstly, if arbitrators decided in the absence of an arbitration agreement or on the basis of a void or expired agreement; secondly if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed; thirdly, if arbitrators decided in a manner incompatible with the mission conferred upon them; fourthly, whenever due process has not been respected; and finally, if recognition or enforcement is contrary to international public policy. The appeal is brought, examined, and decided in accordance with the rules applicable to litigation

²³⁶Under article 1499 NCPC

²³⁷Article 1499 § 2 NCPC

²³⁸Such a verification has been criticised because it would not accept arbitral awards based on oral arbitration agreement : oral agreements are contrary to article 1443 NCPC. BELLET & MEZGER in Rev. Crit.DIP 1981. 639

before the Appeal Court²³⁹. If the appeal is rejected, then the decision confirms enforcement of the arbitral award²⁴⁰. When the decision has been rendered in France²⁴¹, the 1981 legislation only provides for an action to set aside because the decision itself cannot be challenged²⁴².

With the 1980 Decree, the means of recourse for domestic awards have been completely rethought. For domestic awards before the 1980 reform, there were several types of actions to prevent the use of arbitral awards : *tierce opposition*, appeal and setting aside.

Under article 1481§1 NCPC, an arbitral award may not be the object of opposition or of an appeal to the *Cour de Cassation*²⁴³. Under article 1481§2 NCPC, arbitral awards may be the object of *tierce opposition*²⁴⁴ before the court which would have had jurisdiction²⁴⁵. Due to the contractual nature of arbitration, third persons are entitled to exercise the right of *tierce opposition* when the arbitral award, if recognised and enforced, would affect their interests and cause them damage. The persons entitled to exercise this right are : any person who can establish the existence of damage which would occur consequent upon the enforcement of an arbitral award²⁴⁶. Finally, the *tierce opposition* is brought before the court which would have had jurisdiction but for arbitration, either the TGI or TC²⁴⁷.

The unity of appeal and of an action to set aside should be noticed. Under article 1483 NCPC, if the parties have not waived their right to appeal, they must bring it before Appeal Courts. And, under article 1485 NCPC, if the parties have waived their right to appeal, they can ask Appeal Courts to decide on the merits of the case in order to set aside the arbitral award. Finally, if there is an order refusing enforcement, a

²³⁹Article 1487 § 1 NCPC to which article 1507 NCPC refers back.

²⁴⁰Article 1507 NCPC which refers to article 1490 NCPC.

²⁴¹With an international arbitration

²⁴²'Etant précisé que l'étendue du contrôle exercé par la Cour d'Appel est alors rigoureusement identique à celui qui s'applique à travers l'appel formé à l'encontre de la décision de reconnaissance ou d'exéquatur aux sentences rendues à l'étranger et que le délai pour attaquer la sentence est suspensif de sorte que le régime procédural des deux mécanismes qui permettent à la Cour d'Appel d'exercer son contrôle est parfaitement homogène'. Juris Class. 1072. 9

²⁴³Opposition is excluded because of the contractual nature of arbitral proceedings. Appeal to the Supreme Court (*pourvoi en cassation*) cannot be exercised because it is reserved for decisions which have been rendered by a first instance and later by an appeal court. Refer to Appendix 3.

²⁴⁴An appeal against a default judgement. The defaulting party lodges an appeal before the court who rendered the decision. The defaulting party will be able to present his case, to be heard by the court, to state his arguments which was not previously done.

²⁴⁵Subject to the provision of article 588.1 NCPC

²⁴⁶ROBERT & MOREAU 1993 p198

²⁴⁷Designated by articles 42 and 46 NCPC

party may ask Appeal Courts to consider the arguments which have been made against this arbitral award by the enforcement judge²⁴⁸.

For international awards, there are several types of actions to prevent the use of arbitral awards : the party wishing to prevent the arbitral award from being implemented in France can try to obtain a decision from a French court refusing its recognition, its enforcement and finally the party can try to have the arbitral award set aside.

Under article 1504 NCPC, an international award rendered in France is subject to an action to set aside on the grounds set forth in article 1502 NCPC. Article 1504 NCPC follows the general trend imposed by international conventions dealing with recognition and enforcement of arbitral awards. The state where arbitration has taken place is the state which has jurisdiction to deal with the decision on setting aside an award. The country where enforcement is envisaged can simply accept or refuse to grant effect to this decision. And article 1504 NCPC implies that arbitral awards rendered abroad are not within the scope of French courts. Their non-jurisdiction to set aside foreign awards is so strict that, if a party tries to obtain the setting aside of a foreign award by French court, he may be condemned for abusive procedure²⁴⁹. The proceedings for setting aside a French award are brought before the Appeal Court of the place where the award was rendered²⁵⁰. The rules of procedure are also the same as for domestic awards and are regulated by article 1487 NCPC.

The 1981 Decree harmonises the recourse system for international arbitration with the domestic system²⁵¹. The reasons for setting aside and refusing enforcement of awards set forth by article 1502 NCPC are restricted. The restrictive aspect has been

²⁴⁸Whichever recourse it is, it is brought before Appeal Courts and will lead to a consideration of the merits of the case unless the contrary has been expressed by the parties (article 1485 NCPC). The procedure to follow is to make a petition to the clerk of Appeal Courts and to select a barrister or advocate (*avoué*) who is entitled to plead before Appeal Courts. The recourse may be brought immediately after the rendering of the award or within one month following its official notification (article 1486.2 NCPC). The rules applicable to litigation (article 1487 NCPC which refers to articles 901 to 914 NCPC) should be utilised before Appeal Courts.

²⁴⁹*Aita v Ojeh*, Appeal Court, 18th February 1986. The court hold that the procedure to set aside is 'réserve par l'article 1504 NCPC aux seules sentences en France en matière d'arbitrage international' because the award was rendered in London UK. *Rev Arb.* 1986. 583 comment Flecheux

²⁵⁰Article 1505 NCPC

²⁵¹With a view to simplifying the procedures of appeal and of setting aside, the 1981 decree has deleted the means of recourse for foreign arbitral awards and for those of international nature. The *tierce opposition*, appeal in general, *recours en revision* and *action en inopposabilité* are excluded because they would require that a judge decide on the merits of the case and because these actions are too strict and are not liberal enough for international awards.

reaffirmed by the *Cour de Cassation* in *SPP v République Arabe d' Egypte*²⁵² in holding that the Appeal Court's task, in conformity with article 1502 NCPC and 1504 NCPC, is strictly limited to control on the grounds listed in both articles²⁵³. The first four grievances stated by article 1502 NCPC are the same applied for a domestic award. The fifth grievance refers to international public policy, and is of narrower scope than the French public policy which is just for domestic awards.

If arbitrators decide in the absence of an arbitration agreement or on the basis of a void or expired agreement, the appeal against a decision granting enforcement or recognition will be accepted. The grievance allows the appeal judge to check the jurisdiction of arbitrators. How the absence of an arbitration agreement and the determination of a void and expired agreement should be analysed by the appeal judge is not specified in article 1502 NCPC. The judge has, thus, a discretion on how to check the existence and the validity of arbitration agreements²⁵⁴.

The absence of an arbitration agreement rarely occurs but it is often used by the parties as a ground of challenge²⁵⁵. Whether an arbitration agreement exists may be difficult to determine if the agreement is affected by the parties' lack of capacity or by their lack of ability to consent or when a party considers that the agreement has lapsed.

The nullity of an arbitration agreement may occur if the making of the arbitration agreement is defective by mistake, fraud or violence (*erreur, dol, violence*). It also occurs when an arbitration agreement is affected by lack of capacity or by the lack of the ability of the parties to sign the arbitration agreement²⁵⁶. Nullity of an arbitration agreement also happens when it does not state the procedure for appointing

²⁵²*Southern Pacific Properties Limited et Southern Pacific Properties (Middle East) v Arab Republic of Egypt, Cour de Cassation*, 6th January 1987 26 ILM (1987) 1004

²⁵³*Southern Pacific Properties Limited et Southern Pacific Properties (Middle East) v Arab Republic of Egypt, Cour de Cassation*, 6th January 1987 26 ILM (1987) 1004 at 1006. *The Cour de Cassation* said that 'if the role of the Courts of Appeal is limited to the examination of the grounds, there is no restriction upon the power of the court to examine as a matter of law and in consideration of the circumstances of the case, elements pertinents to the grounds in question; (...) it is for the court to construe the contract in order to determine itself whether the arbitrator rules in the absence of an arbitration clause'.

²⁵⁴There is an increasing trend to admit the coexistence of the method of conflict of law together with the material rule. A. HUET *Les procédures de reconnaissance et d'exécution des jugements étrangers et des sentences arbitrales en droit international privé* in 115 JDI 1988. 19

²⁵⁵'L'alinéa des articles 1484 et 1502 est le moyen que les parties invoquent le plus souvent. Il l'a été 195 fois, 124 fois en matière d'arbitrage interne et 71 fois en matière d'arbitrage international'. S. CREPIN *LES SENTENCES ARBITRALES DEVANT LE JUGE FRANCAIS : LA PRATIQUE DE L'EXECUTION ET DU CONTROLE JUDICIAIRE DEPUIS LES REFORMES DE 1980-1981*.1995 p194 (Hereinafter CREPIN 1995)

²⁵⁶*Bomar Oil N.V v E.T.A.P.*, Appeal Court of Paris, 20th January 1987 in JDI 1987. 934 comment Loquin

arbitrators²⁵⁷ under article 1448 NCPC. Another example of the nullity of an arbitration agreement occurs when the dispute deals with a subject-matter which is non arbitrable²⁵⁸.

Finally, when the arbitration agreement is expired²⁵⁹, this engenders a direct setting aside by Appeal Courts because the arbitral award is rendered after the termination of the deadline²⁶⁰.

If the arbitral tribunal was irregularly composed or the sole arbitrator was irregularly appointed, the appeal against a decision granting recognition or enforcement will be granted²⁶¹. French law demands compliance with the parties' equality in choosing arbitrators²⁶² and with the parties' will as expressed in their arbitration agreement and with the procedural rules set by the parties. In dealing with irregularity of constitution of arbitral tribunals, the approach of the matter for domestic arbitration is more severe as French courts will check the arbitration agreement and check if the appointment is in conformity with the mandatory rules²⁶³. Again, they will check that the constitution of domestic arbitral tribunals is done in conformity with the rules set forth in articles 1453 NCPC, 1454 NCPC and 1455 NCPC²⁶⁴. For

²⁵⁷*Société Entreprise Chagnaud v Société Arcole*, Appeal Court of Paris, 17th October 1991 in CREPIN 1995 p208

²⁵⁸*Vitali v Maindrault*, Appeal Court of Paris, 10th December 1985 in Rev Arb. 1987. 157 comment by M. Rondeau-Rivier. The claimant wanted to have a labour dispute referred to arbitration which is forbidden by French law since it is a matter that should be dealt by a labour court.

²⁵⁹This ground has been used 34 times for domestic arbitration and 16 for international arbitrations'. in CREPIN 1995 p220

²⁶⁰*Société Hostin Armes Blanches v Société Prieur Sports*, Cour de Cassation, chambre civile 2, 18th May 1989 in Rev. Arb. 1990. 903 comment Moreau

²⁶¹This ground has not been frequently used during the decade in CREPIN 1995 p225

²⁶²*Société BKMI Industriale Lagen et Siemens v Dutco Construction*, 5th May 1989 in Rev. Arb. 1989. 723 comment Bellet and *Société BKMI et Siemens v Société Dutco*, Cour de Cassation, chambre civile 1, 7th January 1992 in Rev. Arb. 1992. 471 comment Bellet. In France, both parties should have an equal opportunity to choose an arbitrator. When there are several claimants or defendants, the arbitrator must be jointly appointed by claimants or defendants failing which the appointment will not be valid. The Dutco decision concerns the principle of equality between the parties and raises the problem when one party has the opportunity to nominate its arbitrator and not the other or fails to profit of this opportunity.

²⁶³Such as the even number of arbitrators in the case *Société Spadem v Société ADAGP*, Appeal Court of Paris, 22nd March 1990 in Rev. Arb. 1991. 123 comment Moitry and Vergne.

²⁶⁴*Association ESCP v GIE Marquedit*, Appeal Court of Paris, 15th May 1987 in Rev. Arb. 1987. 503 comment Zollinger and *Société SNC-MBE et Cie v Société Fimotel*, Appeal Court of Paris, 18th April 1989 in Rev. Arb. 1990. 915 comment Moitry and Vergne and *Société Nationale des Entreprises de Presse v Société Le Petit Méridional*, Appeal Court of Paris, 26th May 1983 in Rev. Arb. 1984. 390 comment Bernard. In these cases, the Appeal Courts penalised awards because they were rendered by an arbitral tribunal composed of 2 arbitrators, when the third arbitrator was appointed by a single arbitrator without the second arbitrator's agreement and without the parties' agreement.

international arbitrations, they only check that the parties' will and that their procedure are respected²⁶⁵.

If arbitrators decide in a manner incompatible with the mission conferred upon them, the appeal against a decision granting recognition or enforcement will be granted. The third grievance is quite general²⁶⁶.

With regard to the rules of procedure, arbitrators would be said to breach them if they do not decide the case in conformity with the rules of procedure set forth by the 1980-81 decrees, or by the rules stated in the arbitration agreement or by the rules of an arbitral institution. If the arbitration agreement indicates that arbitrators must act as *amiable compositeurs*, they should do so ; if they are not given such a power and they decide the case as *amiable compositeurs*, arbitrators then do not respect their mission²⁶⁷.

With regard to the merits of the case, French case law took the grievance in a narrower sense in order to penalise the failure to appreciate the demands of the parties as well as the excess of the power conferred to arbitrators.

When arbitrators fail to complete their mission, they rule *infra-petita*. *Infra-petita* has a wide scope. On the one hand, *infra-petita* may happen from a wrong estimation by arbitrators of the scope of their jurisdiction²⁶⁸. On the other hand, *infra-petita* may happen when arbitrators do not rule upon one question in the arbitration agreement, whether a deliberate refusal or a mere omission²⁶⁹. The failure by arbitrators to award damages when so requested in the arbitration agreement, or to specify in the award how the costs of arbitration should be shared between the

²⁶⁵ *Société Gas Del Estado v Société Ecofia et ETPM*, Appeal Court of Paris 11th February 1988 in Rev. Arb.1989. 683 comment Zollinger and *Société Socimer v Société Unidaf*, Cour de Cassation, chambre civile 1, 4th December 1990 in Rev. Arb. 1991.181 comment Fouchard

²⁶⁶ As this ground is general, it was often used by parties between 1981 and 1991: 166 times see CREPIN 1995 p235

²⁶⁷ *Société Phocéenne de Dépôt (SPD) v Société Dépôts Pétroliers de Fos (DPF)*, Appeal Court of Paris, 20th January 1989 in Rev. Arb.1989. 280 comment Idot and see E. LOQUIN Les Pouvoirs de l' amiable compositeur à propos de 3 arrêts de la Cour d' Appel de Paris in Rev. Arb. 1985. 199

²⁶⁸ In *Société Swiss Oil Corporation v Société Petrogab et République du Gabon*, the Appeal Court explained that the power of arbitrators to decide about their jurisdiction is not final, it is subject to the control of the court dealing with the decision granting recognition and enforcement. In that case, the Appeal Court justified its decision to refuse the appeal on the grounds that arbitrators exceeded the limits of the arbitration agreement, and they were therefore in breach of the parties' will. *Société Swiss Oil Corporation v Société Petrogab et République du Gabon*, Appeal Court of Paris, 16th June 1988 in Rev. Arb.1989. 309 comment Jarrosson

²⁶⁹ *Laboratoires Simone Malher v Becq*, Appeal Court of Paris, 1st December 1987 in Rev. Arb.1989. 236 comment Devolve.

parties²⁷⁰, or to check the work when this was specifically requested in the arbitration agreement, will amount to *infra-petita*. In general, *infra-petita* is frequently pleaded by the parties, but rarely accepted by national courts²⁷¹ because quite often they consider that arbitrators did not rule *infra-petita*, when arbitrators acting as *amiable compositeurs* rule in equity without avoiding the law (*écarter le droit*)²⁷².

With *ultra-petita*, arbitrators do not respect their mission. The ground of *ultra-petita* may occur in several situations. Even if arbitrators remain within the limits of the arbitration agreement, when they rule upon demands which were not formulated by the parties, they rule *ultra-petita*²⁷³. When arbitrators deal with a point which is not among the points included in the arbitration agreement, they rule *ultra petita*. When arbitrators award the parties more than the parties asked for, they rule *ultra-petita*. If arbitrators award damages when they were not asked to do so, or when they make the damages start earlier than the date requested²⁷⁴. Arbitrators may deal with incidental demands (*demandes incidentes*), as long as they have a connection with the initial demand of the parties²⁷⁵.

When the adversarial principle (*principe du contradictoire*) is not respected, an appeal against a decision granting recognition or enforcement will be granted. The adversarial principle is a fundamental principle of French law, Appeal Courts check its implementation with great care. International awards or domestic awards will be set aside and will not be enforced if it is not complied with²⁷⁶. Its non-compliance is often

²⁷⁰Y. Mondeil v J. De Ligault, Appeal Court of Paris, 20th March 1986 in Rev. Arb.1991. 82 comment Moreau

²⁷¹*Société Alpha Transports et autre v Société VOOF Marleen Cool Trans, Cour de Cassation* Chambre civile1, 2nd May 1990 in Rev. Arb.1991. 285 comment Loquin and *Coumet es Qualité er Ducler v Société Polar-Rakennusos A Keyhtio*, Appeal Court of Paris 8th March 1990 in Rev. Arb.1990. 625 Comment Mayer

²⁷²*Sociétés TAI, ESW, IEC et autres v Sociétés SLAPE et EG*, Appeal Court of Paris, 2nd June 1989 in Rev. Arb. 1991. 87 comment Reymond

²⁷³*Société ImmoPlan v Société Mercure*, Appeal Court of Paris, 19th January 1990 in Rev. Arb. 1991 comment Moitry and Vergne. The award was set aside because the arbitral tribunal ruled on real estate rights while this was not requested by the arbitration agreement. *Société Total Chine v Sociétés EMH et GSC*, Appeal Court of Paris, 28th June 1988 in Rev. Arb.1989. 328 comment Pellerin. The award was set aside because the arbitral tribunal give an early date for the starting point of the damages which was different from the date requested by the claimant.

²⁷⁴*Société Total Chine v Société EMH et GSC*, Appeal Court of Paris, 28th June 1988 in Rev. Arb.1989. 328 comment Pellerin

²⁷⁵*GIGA v Société La Margeride et autres*, Appeal Court of Paris, 13th January 1984 in Rev. Arb.1984. 530 comment Bernard. In this case, the arbitral tribunal dealt with compound interest which was a question directly connected to the question of the financial situation of the parties.

²⁷⁶Because it is a fundamental principle stated in article 14 NCPC.

alleged by the parties²⁷⁷ but not always accepted²⁷⁸. The case law underlines that arbitrators have the duty to comply with the adversarial principle even if they are acting as *amiable compositeurs*²⁷⁹. Arbitrators must hear the parties before deciding their case, and if this is not done there is a breach²⁸⁰. Again, the parties must be given the opportunity to present their case, to explain their position²⁸¹. In dealing with documents or evidence produced after the deadline set by arbitrators for submission, arbitrators must ensure that any late documents can be examined and discussed by each party and their counsel. To obtain the setting aside of awards on that ground, it must be proven that the parties and their counsel were not given such an opportunity²⁸². With regard to measures such as expertise and site inspection, arbitrators must submit all reports, documentation and information collected to each party for their consideration²⁸³.

If recognition and enforcement are contrary to international public policy, the appeal against a decision granting recognition or enforcement will be granted. For domestic arbitration, the breach of international public policy is only checked with regard to the merits of the case. The notion of public policy is linked to the subject-matter of the arbitration, because arbitration is excluded for certain areas of the law²⁸⁴, as these topics are reserved for state courts' jurisdiction. As to procedure, arbitral awards rendered under a procedure that does not respect the basic mandatory rules²⁸⁵, will be not recognised and enforced. For international awards, Appeal Courts will only

²⁷⁷It was used 162 times during the 1981-91 decade which 91 cases were domestic and 71 cases were international. CREPIN 1995 p249

²⁷⁸*Société Intercontinental Hotels N.V v Société Istanbul Turizm Ve Otelcil*, Appeal Court of Paris, 18th November 1983 in Rev. Arb.1987. 77 comment Bernard

²⁷⁹*Marscaldi v Donyo*, Appeal Court of Paris, 2nd February 1988 in Rev. Arb.1989. 62 comment Couchez, *Nedjar v Benodiel*, Appeal Court of Paris, 21st February 1989 in D.1989. 81

²⁸⁰*Société Matra v Société Alkan*, Appeal Court of Paris, 28th April 1988 in Rev. Arb.1989. 280 comment Idot

²⁸¹*Société Immoplan v Société Mercure*, Appeal Court of Paris, 19th January 1990 in Rev. Arb.1991. 125 comment Moitry and Vergne

²⁸²*Ganem v Ajalbert*, Appeal Court of Paris, 10th November 1989 in Rev. Arb.1991.651 comment Pellerin and *Consorts Mulliez v Ruckstuhl et autre*, Appeal Court of Paris, 9th November in CREPIN 1995 p259

²⁸³*GIGA v Société La Margeride et autres*, Appeal Court of Paris, 13th January 1984 in Rev. Arb.1984. 530 comment Bernard. and *Société Sporprom Services B.V v Société Polyfrance Immo*, Appeal Court of Paris, 18th January 1983 in Rev. Crit. DIP 1984. 87 comment Mayer

²⁸⁴See in chapter 1

²⁸⁵They are relating to : the extension of the deadline by either the parties or by state courts (*Reverdy et autres v Courthéoux*, Appeal Court of Paris, 26th January 1988 in Rev. Arb.1988. 307 comment Jarrosson), the equality of parties in appointing arbitrators (*Société BKMI Industriean Lagen et Siemens v Dutco Construction*, *Cour de Cassation*, chambre civile1, 7th January 1992, in Rev. Arb.1992.470 comment Bellet), the obligation to give the reasons in awards (*Laboratoires Simone Malher v Becq*, Appeal Court of Paris, 1st December 1987 in Rev. Arb.1989. 236 comment Devolve).

consider the breach of international public policy set forth by French private international law²⁸⁶. They will be more lenient regarding the implementation of mandatory rules. For instance, the need to include reasons in arbitral awards will be strictly implemented only if the parties or arbitrators have decided to use French law as the applicable law for the arbitration²⁸⁷ or if the arbitration agreement specifies that arbitral proceedings be conducted in conformity with the rules of the NCPC²⁸⁸. But if the arbitral award is rendered in conformity with a procedure different from the French one, then the need to include the reasons is no longer a public policy question²⁸⁹. In international arbitration, the trend of the case law is to impose a sanction for the breach of international public policy when the infraction is patently obvious. French courts have an entire discretion to accept or reject the grounds²⁹⁰ used by the parties in order to grant recognition or enforcement to an arbitral award of international nature or to a foreign arbitral award.

The above grounds, of interest for international awards, are the grounds expressly mentioned in article 1502 NCPC. In dealing with domestic awards, French courts may consider other grounds which can also affect the validity of arbitral awards. The first set of grounds is found in article 1480 NCPC of the 1980 decree namely : an award is null unless it complies with the mandatory provisions such as the need to include reasons²⁹¹ in arbitral awards, the names of arbitrators²⁹², their signature²⁹³, the date²⁹⁴ and the place where the award was made. The second set of grounds relates to the lack of independence or impartiality of the arbitrators. To obtain the setting aside of an arbitral award on such a ground, the parties must prove that

²⁸⁶*CTIP v Ferich International Ltd*, Appeal Court of Paris, 21st March 1986 in Rev. Arb.1991.350 comment Moitry and Vergne

²⁸⁷*Société Freyssinet International v Consorts Renardet*, Appeal Court of Paris, 28th February 1992 in Rev. Arb.1992. 649 comment Cohen

²⁸⁸*Société Total Chine v Société EMH et GSC*, Appeal Court of Paris, 28th June 1988 in Rev. Arb.1989. 328 comment Pellerin

²⁸⁹*Société Touraine Air Transport v Société de Droit Danois Danis Aero Lease*, Appeal Court of Paris, 23rd June 1983 in CREPIN 1995 p286

²⁹⁰Which are equivalent to those proposed in the 1958 New York Convention on recognition and enforcement of arbitral awards. These grounds are provided by article V of this convention.

²⁹¹*Société Groupe SOGEI v Société LEP International*, Appeal Court of Paris, 19th October 1990 in Rev. Arb.1991. 364 comment Moreau

²⁹²*SA Hannover International et autre v Société Uni Europe*, Appeal Court of Paris, 18th November 1993 in CREPIN 1995 p267

²⁹³*Proux v Guerton*, Appeal Court of Paris, 27th October 1988 in Rev. Arb. 1990. 908 comment Moreau and *Maggini v Gormy*, Appeal Court of Paris, 20th June 1989 in Rev. Arb. 1992. 85 comment Arnaldez

²⁹⁴*SA Hannover International et autre v Société Uni Europe*, Appeal Court of Paris, 18th November 1993 in CREPIN 1995 p267

arbitrators are not impartial or not independent by describing the circumstances giving rise to reasonable doubts²⁹⁵.

Between 1981 and 1992, nearly 2000 arbitral awards were considered by French courts. Among them, 1711 were studied by TGI, 214 by the Appeal Court of Paris and 75 by other Appeal Courts²⁹⁶. Among them, a number related to international awards, namely 567 for TGI, 87 for Appeal Court of Paris and 17 for other Appeal Courts. Within the time of reference, 671 awards dealt with by French courts were international whereas 1329 were domestic awards²⁹⁷.

To conclude, a certain consistency characterises the control carried out by French courts. They verify that arbitral awards are not in breach of articles 1484 and 1502 respectively for domestic and international awards. They strictly interpret the grounds set forth by articles 1484 NCPC and 1502 NCPC, even those which are generally expressed by the code. Their control before granting enforcement or recognition of awards is sound and justified. It is sound because they follow the principles laid down by the New York Convention, in its article 5, and by the 1980 and 1981 decrees.

The *a posteriori* control is justified in order to ensure that the parties have a means of recourse if arbitrators did not decide the dispute in conformity with the mandatory rules of procedure, or the rules of public policy. In challenging awards, the parties prove to have great imagination, but the position adopted by French courts is constant as they only consider the validity of awards in relation to the specified grounds. In conclusion it should be said that far from damaging arbitration, French courts help arbitration in preserving it from awards disregarding the fundamental principles of justice.

Part 3 : Scrutiny of awards under the ICC Rules

The review of arbitral awards is carried out by the ICA²⁹⁸. Arbitrators must submit any award, whether partial or definitive, in draft form to the ICA for a careful scrutiny.

²⁹⁵*S.N.C Raoul Duval v Société Merkura Sucden*, Appeal Court 2nd July 1992 in CREPIN 1995 p232. In this case, the arbitrator chosen by an arbitral institution has been appointed as the senior trader by one of the parties after the rendering of the arbitral award. This fact came to the knowledge of the other party and gave ground to the Appeal Court to set aside the award in question.

²⁹⁶CREPIN 1995 p11

²⁹⁷CREPIN 1995 p16 and 17

²⁹⁸Under article 21 of the 1988 Rules and article 27 of the 1998 Rules

In practice, arbitrators submit their draft award to the counsel in charge of the case (that is a staff member of the Secretariat). At this time, the counsel²⁹⁹ determines whether the award in question is either a 'Part A Award'³⁰⁰ or a 'Part B Award'³⁰¹. The counsel studies the proposed draft award and prepares an agenda in which it is described how the draft award is organised by stating its structure and then a summary of the draft award as well as the reasoning of each question answered in the award. The counsel would also note any obvious mistakes such as typing errors, mathematical mis-calculations, failure to deal with a particular claim or failure to indicate a reference to the applicable law or failure to give the currency in which the interest is given. Finally the counsel checks that the draft award addresses all the issues listed in the terms of reference. The counsel presents his agenda at a weekly staff meeting during which the choice of Part A or Part B award is discussed and agreed by the Secretary General and the counsel in question. If the draft award is considered to be a 'Part A Award', the counsel asks a reporter³⁰² amongst the ICA members to prepare another written report to be given to every ICA members before its session³⁰³. The reporter studies the reasoning of each question and at the end he concludes whether or not the ICA should approve the draft award and what modifications, if any, should be required or suggested to the arbitrators. For a Part B award, the counsel also prepares an agenda, discussed during a staff meeting. Every draft of a Part B award is submitted along with the case reports and recommendations to a Committee of the ICA for a preliminary review. Normally a Part B award will be approved by the Committee of the ICA and then it goes to the ICA. The presentation of the recommendations of the Committee of the ICA is usually accepted by the ICA and rarely discussed during plenary sessions of the ICA. It is therefore a formality, nothing else. The distinction between Part A or Part B awards might disappear in the future³⁰⁴.

²⁹⁹In the Secretariat, there are 6 teams which are led by Anne Cambournac, Odette Lagacé Glain, Anne-Marie Whitesell, Christopher Koch, Joachim Kuckenburg and Fernando Mantilla Serrano.

³⁰⁰'Part A awards' are draft awards which involve interesting questions, where one party is a state or a national entity, where there is a dissenting opinion, where there is a difficulty as to the reasoning of the draft award, a delicate case involving newcomers in the ICC area.

³⁰¹All other awards which do not raise difficulties.

³⁰²One should wonder if the reporter's intervention is not a waste of time since the Secretariat carefully studies any draft award. During my internship, it was striking to hear that the reporter sometimes repeated the content of the Secretariat's comment in the agenda without adding any more information.

³⁰³The choice of the reporter is usually based upon his familiarity with the applicable law, the legal questions involved in the arbitration and the familiarity with the language of the case.

³⁰⁴Such a rumour was heard at the ICC during my internship.

The ICA may suggest modifications in several areas such as the form of award. The procedure of scrutiny requires both the intervention of the Secretariat and of the ICA itself. Even if the arbitral award is the product of arbitrators, the institution cannot take the risk of allowing arbitral awards to carry the ICC cachet³⁰⁵ without previously checking that they are not undermined by procedural defects, by defects in relation to their form and by defects relating to their substance. The boundary line between the modifications of form and the modifications of substance is very difficult to draw with certainty. Some clarification as to the distinction might be helpful³⁰⁶.

When the ICA requests some modification of the form of awards, its decision is clearly mandatory simply because it has the 'duty not to give finality to an ICC award until the formal prerequisites of a binding award have been complied with'³⁰⁷. The modifications of form relate to typing errors, or clerical mistakes or miscalculation of dates or of damages or any errors of this kind.

Some modifications may be recommended as far as the applicable law of the arbitration is concerned for example with respect to the legal requirements for the signature of the arbitrators, reference to mentions of the date and place of the award, the reasons in the awards, the acceptance of dissenting opinions or not³⁰⁸. Again, the ICA may consider points of substance such as whether arbitrators awarded interest when they were expected to award damages. It should not be misunderstood that the ICA re-examines the facts and the questions of law. In such a case, when the ICA wishes to draw the attention of the arbitrators to some points of substance, it does not approve the draft award but returns it with its suggestions. Arbitrators are then required to re-submit the draft award to the ICA. For a second time, the draft award will go through the same process of scrutiny.

The modification as to the content relates to conformity with the terms of reference. If the draft award does not follow them, it will be either *ultra petita* or *infra petita*³⁰⁹. The ICA examination only examines the 'degree of coherence and consistency'³¹⁰ of awards.

³⁰⁵CRAIG & PARK & PAULSSON 1990 p341

³⁰⁶Practitioners do not always agree as to the nature of modifications whether or not they are of substance or of form. There has been some concern expressed by practitioners at the ICC CONFERENCE 1998.

³⁰⁷CRAIG & PARK & PAULSSON 1990 p344

³⁰⁸In accordance with article 17 of the Internal Rules

³⁰⁹If for instance arbitrators awarded interest while they were not entitled to do so, or if they awarded interest while they were only entitled to award damages.

³¹⁰CRAIG & PARK & PAULSSON 1990 p345

Once the ICA has scrutinised the draft award, the Secretariat will send it back to the arbitrators along with the mandatory recommendations and the modifications sought. They will have to incorporate them, otherwise the ICA may refuse to approve the award. In practice, it might happen that an arbitrator refuses to integrate the required modifications. The counsel in charge of the case would try to convince the recalcitrant arbitrator to include them or maybe find a compromise. But if the arbitrator still refuses, the ICA may ultimately replace him³¹¹. But such a decision is really extreme. The present writer believes that the ICA would try to avoid such a drastic solution and prefer a mid-way solution. The ICA might approve the award despite the arbitrator's refusal to integrate its modifications if they are not essential. In a future arbitration, the Secretariat would certainly remind the ICA of the negative arbitrator's behaviour when considering him as a potential arbitrator for a future arbitration.

Under no circumstances does the ICA wish to undermine the freedom³¹² of arbitrators³¹³. Most of the time, it only demands a new effort of 'draftmanship and coherence'³¹⁴ which should produce a better award. In the writer's opinion, the ICA scrutiny of awards should not be criticised since it is always done with due respect for the arbitrators' liberty, and it is done to ensure a straightforward acceptance and implementation of ICC awards³¹⁵. The procedure has been criticised for being time-consuming without yielding any tremendous benefits³¹⁶. Any draft award is read, at least 3 times by a counsel and after that by the Secretary General and General Counsel who read it and discuss it again. Such a procedure is obviously a source of delay but there is room for improvement and for reducing delays. The Working Parties proposed that the Committees of the ICA be allowed to approve Part B awards, and it is also proposed that the Secretary General be left with the power to check if the modifications recommended by the ICA have been introduced by arbitrators in the award³¹⁷.

With a view to improving the in-house practice, the present writer wonders whether the reporter's intervention is not a waste of time since the Secretariat carefully

³¹¹Under article 2§11 of the 1988 Rules and article 12§2 of the 1998 Rules.

³¹²CRAIG & PARK & PAULSSON 1990 p345

³¹³Though arbitrators may feel that the ICA's request for modifications of forms are sometimes modifications of substance. This view was expressed at the ICC CONFERENCE 1998.

³¹⁴CRAIG & PARK & PAULSSON 1990 p345

³¹⁵Which are usually voluntarily put into practice by the parties in 90% of cases. CRAIG & PARK & PAULSSON 1990 p343

³¹⁶V. Goekjian quoted by H. SMIT in 10 Arb. Int. 1994. 53 at 70

³¹⁷WORKING PARTY Document 420/344 p 30

studies any draft award. The role of the reporter should be redefined or completely suppressed if one wants to gain time in the process of approval or awards.

The present writer also wonders whether the Part A and Part B distinction might be suppressed. The disappearance of such a distinction would make the Secretariat's work easier since a counsel would not have to wait for a specific committee of the ICA to present a draft award. The disappearance of such a distinction would assist in removing the heavy counsels' workload previous to any plenary session of the ICA. At present, a counsel receiving a draft award has to wait for the plenary session of the ICA to submit a Part A award. If the distinction between Part A and B awards were to disappear, a counsel would be able to present a problematic award to the committee of the ICA for a first analysis and if there were difficulties a reporter would be asked to study it and present his report to the plenary session of the ICA.

Part 4 : Challenge of awards under the Model Law

The provisions of the Model Law concerning recourse against arbitral awards are of great importance since they establish that an action to set aside is the exclusive recourse against arbitral awards. Article 34 stipulates the exclusive recourse as being the action to set aside and also lays down the specific grounds³¹⁸ upon which a challenge must be made. Besides, article 34 fixes the deadline within which the action must be brought before the court, namely a 3-month period from the date on which the party received the award or, if a request has been made under article 33, from the date on which that request has been disposed of by the arbitral tribunal. According to article 34§1, the only means of challenging arbitral awards in international cases, in Scotland, will be an action to set aside before the Court of Session or the Sheriff Court where it has jurisdiction. Article 34§2 lays out the grounds upon which awards can be aside. Seven grounds are available to set aside awards.

The first ground for setting aside is the incapacity of a party to enter into the arbitration agreement or the invalidity of the arbitration agreement. The ground must be considered under the law that the parties have referred to or, failing such indication under the law of Scotland.

The second ground is that a party was unable to present a case, not having been given proper notice of the proceedings or of the arbitrators' appointment. This ground directly refers to article 18 of the Model Law establishing that the parties be treated

³¹⁸Borrowed from the 1958 New York Convention

equally and each party be given a full opportunity to present its case. If this happens, the parties are denied fair treatment, and this should be carefully avoided : this is the purpose of the ground.

The third ground is that awards exceeding the arbitrators' jurisdiction must be set aside. When arbitrators deal with questions not included in the arbitration agreement, the award should be set aside accordingly. Unlike the position in domestic Scottish awards, the Model Law suggests that part of the award in question may be set aside, but only if that part can be separated from the rest of the award.

The fourth ground is that the procedure and the composition of the arbitral tribunal is not in accordance with the parties' agreement and the Model Law. The idea behind the ground is fairly obvious. It covers procedural impropriety relating to their constitution, such as failure to appoint arbitrators by the method envisaged in the arbitration agreement, or the fact that one party only appoints arbitrators or the fact that the third arbitrator is appointed without the knowledge of one arbitrator and so on.

The fifth ground is that the award has been procured by fraud, bribery or corruption³¹⁹. This only appears in the version of the Model Law adopted in Scotland. The Dervaird Committee suggested that there was a need to make an express reference to this particular ground as this is a major ground in Scots law practice and 'it may well be the case that the award might be challengeable on those grounds because the court found in terms of article 34§2 §b (ii) that an award so procured is in conflict with the public policy of this state'³²⁰.

The sixth ground refers to the non-arbitrability of the subject-matter under the law of Scotland.

The seventh ground refers to breach of public policy. If arbitral awards are in conflict with public policy they must not be enforced. The Scottish version is slightly different from the version in the Model Law, because there is no reference to the public policy of the state. Article 34 also mentions the deadline within which an application for setting aside should be made namely within three months from the date on which the party making the application received the award. The Dervaird Committee recommended against the implementation of that deadline for the ground of fraud, bribery and corruption.

Article 35 of the Model Law sets forth the rules for enforcing awards. The demanding party must supply an authenticated original award or a duly certified copy and the original copy of the arbitration agreement or a duly certified copy along with a

³¹⁹Within the meaning of Article 25 of the Articles of Regulation 1695

³²⁰The Dervaird Report 1989 p15-16

certified translation if necessary. After an application in writing, arbitral awards shall be recognised as binding and be enforced by the competent court. The Dervaird Committee agreed with it it was integrated in the Scottish version without changes.

Article 36 lists the grounds for refusing recognition and enforcement. Seven grounds are available. The first ground is that a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or under the law of the country where the award was made. The second ground is that the party, against whom the award is invoked, was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was unable to present its case. The third ground is that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the submission to arbitration. The fourth ground is that the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties or, failing such agreement, were not in accordance with the law of the country where the arbitration took place. The fifth ground is that the award has been set aside or suspended by the court of the country in which the award was made. The sixth ground is that the subject-matter is not capable of settlement by arbitration under the law of that state. The last ground is that the award is contrary to the public policy of that state.

These grounds for refusing the recognition and enforcement of awards are similar to the grounds for setting aside awards. The fifth ground has no counterpart in article 34. It establishes that an award can be refused recognition and enforcement if it has not yet become binding on the parties and it has been suspended or set aside.

Part 5 : Conclusion of chapter 3

Section 68 of the 1996 Arbitration Act says that serious irregularities affecting arbitrators, the proceedings or the award will justify the challenge of arbitral awards such as breach of their duty; exceeding their powers; failure to conduct the proceedings in accordance with the agreed procedure; failure to deal with all the issues; uncertainty and ambiguity as to the effect of the award; fraud relating to award or an award contrary to public policy; the award not complying with the requested form.

Under the Model Law, seven grounds for refusing recognition or enforcement and for challenge of award are available : first, the incapacity of the parties in making the agreement or the invalidity of the agreement; second, the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present its case; third, the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contain matters beyond the scope of the submission to arbitration; fourth, the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place ; fifth (only for recognition and enforcement), the award has been set aside or suspended by the court of the country in which the award was made; sixth, the subject-matter is not capable of settlement by arbitration under the law of that state; last the award is contrary to the public policy of that state.

The grounds for challenge under French law are the following : if arbitrators decide in the absence of an arbitration agreement or on the basis of a void or expired agreement, if the award is contrary to international public policy, if the award breaches the adversarial principle (*principe du contradictoire*), if arbitrators decide in a manner incompatible with their mission, if the arbitral tribunal was irregularly composed or the sole arbitrator was irregularly appointed, if arbitrators decide in the absence of an arbitration agreement or on the basis of a void or expired agreement or on the basis of a null arbitration agreement due to mistake, fraud and violence (*erreur, dol, violence*) or lack of capacity or by lack of ability from the parties to sign the arbitration agreement when it was made.

The list of these grounds seems repetitive but it was necessary to underline their likeness. These grounds are modelled upon article V of the 1958 New York Convention³²¹. It gave an exhaustive list of the grounds that would justify the refusal to grant recognition and enforcement of arbitral awards and their challenge. The grounds are restricted to the causes which result in the invalidity of arbitral proceedings and of

³²¹Countries which have adopted the Model Law have the same grounds for the challenge of awards and for their recognition while countries which only have adopted the New York Convention may have different grounds for the setting aside and for the recognition. Simply because the grounds for setting aside will be the grounds set forth by the domestic law of that country. In some Arab countries, women cannot act as arbitrators. Imagine an international award made by a female arbitrator, the national court would set it aside because such award is unlawful. This would apply if the country has only adopted the New York Convention.

awards because they cause serious defect to either the proceedings or the award. Their resemblance is normal and is justified since harmony between them is essential to ensure the development of arbitration around the world.

The control exercised by national courts is *a posteriori* control. Such control is really different from the control exercised by arbitral institutions. The control carried out by national courts is confined to verification of the legality of arbitral awards rather than their validity. In other words, whether or not proceedings and later arbitral awards are done in accordance with the duties and the principles laid down by national legislation and the parties' agreements. National courts of each country will verify that arbitral awards are not in breach of the articles stating the grounds for recognition, enforcement and challenge³²².

The control exercised by arbitral institutions is somewhat different. The institutional control is compulsory³²³, it occurs before the notification of the award to the parties, it is characterised by the absence of the parties and it is an indirect control. The compulsory character of the control arises from several points. Such control is a requirement for the validity of the arbitral award. Arbitrators must send their draft award to the permanent body (the Secretariat for the ICC) to obtain their approbation. The obligation to do so arises from the rules of the institution itself. The ICC seems to be quite unique in exercising its scrutiny if one compares other institution's work with awards. If one considers the WIPO, for instance : its centre has a role to play for awards. But its role is rather limited in comparison to the ICA's role. Before the completion of the award by the arbitral tribunal, it may consult the centre with regards to matters of forms particularly to ensure the enforceability of the award. The WIPO centre has only a advisory role. The draft award cannot be refused as it may occur with the ICA's decision.

The *a priori* control arises from several points. The control by the permanent body occurs before the notification of the award to the parties. The rules of the institution contemplate that the draft award must be communicated to the permanent body by arbitrators. After its scrutiny, the draft will be sent back to arbitrators, and a further deliberation may be needed to integrate the recommendations of the permanent

³²² Articles 1484 NCPC and 1502 NCPC for French awards, article 68 for English awards, article 34 and 36 for awards rendered under the Model law.

³²³ This control is not done by all arbitral institutions. The ICA's control of arbitral awards seems to be quite original and unusual.

body. The process is characterised by the absence of the parties. They do not follow it. Nothing is said to them in that respect. The draft award will not be sent to them. The parties will not be given the opportunity to discuss the changes and alterations requested by the permanent body. Everything is done behind their back, without their knowledge but in their interest. The scrutiny of arbitral awards carried out by arbitral institutions is characterised by a certain philosophy. Arbitral institutions may recommend modifications of form. Most likely, such modifications would relate to spelling mistakes, corrections of words, calculation, dates, or terminology. The permanent body ensures that the award complies with the terms of reference previously signed by the parties and arbitrators in order to avoid any excess or deficiency in the award. The institution ensures that the award is made in conformity with the applicable law governing the arbitration as to the arbitrators' signature, dissenting opinions if appropriate, and the reasoning of the award if appropriate. The permanent body ensures that the award will be susceptible of being enforceable at law³²⁴. The control of arbitration performed by arbitral institutions must not amount to the rewriting of the award. Arbitral awards must be the arbitrators' work. Such control by arbitral institutions must not hamper the arbitrators' freedom. It is not in the interest of arbitral institutions to impose their view as to what should be in the award. Their control has its source in the idea that institutionalised arbitrations and their awards should be free from irregularities and from defects so they should not be challenged.

In conclusion it should be said that far from damaging arbitration, either national courts or arbitral institutions help arbitration in preserving it from awards disregarding the fundamental principles of justice.

Part 6 : General conclusion of title 3

To conclude this title dealing with the relationships between national courts and arbitration, it is important to have a reminder about these relationships.

In the past, national courts have exercised extensive control over the arbitral process. Judges sometimes openly showed their hostility to arbitration simply because arbitration was seen as a rival to their jurisdiction as the parties ousted their jurisdiction for arbitrators. An obvious example of this spirit was found in England, where English judges made ample use of their supervisory power to ensure that

³²⁴ See art 26 of the Internal ICC 1988 Rules

arbitrators applied the law. The principal means of exercising such a control was the special case³²⁵. Growing dissatisfaction with the existing system led to the abolition of the special case by the 1979 Arbitration Act. The abandonment of the special case procedure marks an important step forward towards the autonomy of arbitration. With the 1996 Arbitration Act, the tendency witnessed at world-wide level³²⁶, namely the express limitation on court intervention, was followed. The national courts' attitude has greatly evolved from an extensive intervention justified by a suspicious mind to a limited intervention which now aims at assisting, helping the arbitral process and making it effective.

Nowadays national courts provide a positive intervention which could be characterised as a the noble role of an auxiliary of the arbitration process³²⁷. National courts carry out the role of an auxiliary because they assist the arbitral process when needed at its outset, during its course and after its completion.

Before the arbitration even commences, national courts will assist the parties to put the arbitration on the right tracks by appointing arbitrators, by ensuring that the parties go to arbitration if there is a valid arbitration agreement and by granting interim measures required by the parties.

During the arbitration, national courts will help it by ensuring its good functioning when the challenge of arbitrators occur, by filling up gaps as to the arbitrators' coercive powers, by ordering interim measures if arbitrators are not granted such a power. National courts provide for complementary powers to the arbitrators' powers which might be inefficient and ill adapted to the running of an arbitration.

After the rendering of the final award, national courts intervene in relation to its challenge, its recognition and its enforcement. National judges have the responsibility of exercising a supervisory role in verifying that arbitrators have complied with the mandatory rules throughout the arbitral process.

There is a wide consensus as described above concerning the positive impact of the collaboration between national courts and arbitration. The degree of assistance, support and co-operation given to arbitration may vary according to the legal system

³²⁵Please see footnote 1 of this title.

³²⁶With the Model Law

³²⁷J.L DEVOLVE in *Rev. Arb.* 1980. 607 at 616

applicable to the arbitration and of the situs of arbitration. The relationship between national courts or an institutional body such as the ICA is obviously a positive partnership.

Relationships between national courts and arbitration are more friendly; they can be characterised by a fruitful collaboration and a partnership which aims at making arbitration an effective means of settling disputes.

Part 7 : A look to the future

This is the picture at the time of the submission of this thesis. Soon there will be some changes.

Changes will occur with the coming into force of the latest version of the ICC Rules, adopted at the ICC World Congress in Shanghai (7-10 April 1997). This new set of ICC Arbitration Rules will come into effect on the 1st January 1998. These new rules are more flexible and more user-friendly. The changes are designed to speed up the arbitral process and to avoid delays during proceedings with the direct intervention of the Secretary General of the ICA; they are also designed to cover multipartite disputes; they are designed to give more powers to arbitrators and more powers to the ICA to deal best with difficulties. This new set of rules will certainly have a positive boost for ICC arbitrations as the new rules answer to the users' criticisms.

Changes will also occur with the probable adoption of the new Scottish arbitration bill for domestic arbitration. This text is still currently in the making and still being discussed among practitioners, and this is why this text was not considered. With the new government in power at Westminster, its adoption might be postponed. Drastic changes should be expected which should take into consideration the evolution of arbitration practice. Among the expected changes one should find the introduction of new powers and new duties and finally a positive interaction between Scottish courts and arbitration.

In the light of the WTO figures³²⁸ for 1996 and the forecast for 1997, world trade is constantly increasing. The development of world trade is undoubtedly linked to an increase in the number of disputes between the parties who enter into trade contracts. Several factors can be observed : the growth in the number of disputes with parties coming from many different backgrounds, their increasing complexity and the increase in time and cost for their resolution. Thus, arbitral institutions world-wide are experiencing a remarkable growth in the number of international commercial arbitration cases filed. The ICA statistics for 1996 show a surge in cases in Latin America, in the Asia-Pacific region, in Eastern Europe.

In the light of these data, the future of arbitration seems to be promising.

The dynamism of arbitration as a means of settling disputes should be ensured. In the future, an evolution might be witnessed in arbitration. Due to the constant evolution of the world trade with a substantive reduction of state intervention in economic management, the increase in international investments on a world-wide basis³²⁹, the development of world trade under the auspices of the Uruguay Round and any agreement aiming at facilitating world trade and the new type of investment conventions either bilateral or regional³³⁰, arbitration might change.

Some advocate the need to welcome a new type of arbitrators with better knowledge of economics and other fields than law to deal better with investment disputes arising from bilateral and multilateral agreements or with disputes involving other than legal issues³³¹. Accepting that outsiders to the legal world also take part into

³²⁸Information found in the WTO Internet link at <http://www.wto.org.wto/intltrad/introduc.htm>. The volume of world merchandise trade increased by 4% in 1996 - The 1997 forecasts for 1997 anticipate an economic recovery in Western Europe, roughly unchanged growth in North America and a slight deceleration of GDP growth in Japan. In China and the group of 'six East Asian traders' (Hong Kong, The Republic of Korea, Malay, Taiwan and Thailand) where GDP growth rate are two to three times faster than the OECD area, growth is projected to pick up marginally. If the growth forecasts are realised, the volume of trade this year should somewhat expand faster than the 4% gain in 1996, led by stronger trade performance in Western Europe and an expansion of imports into Latin America and developing Asia.

³²⁹ The estimated value of annual foreign direct investment have been boosted during the period 1973 to 1995 increased from US\$ 25 billion to US\$ 315 billion while the value of exports of goods increased from US\$ 575 billion to US\$ 4 900 billion data from 1996 Report of the World Trade Organisation in WERNER J. The Trade Explosion and Some Likely Effects on International Arbitration in *Journal Int. Arb.* 1997 Volume 14 Number 2 p5

³³⁰ Such as NAFTA (the North American Free Trade Agreement of 1992) which binds Canada, Mexico and the United States; the Energy Charter Treaty which has been signed in 1995 by forty-nine countries among those are Eastern European countries, most OECD countries and the European Union and CIS countries.

³³¹ WERNER J. The Trade Explosion and Some Likely Effects on International Arbitration in *14 Journal Int. Arb.* 1997. 5 at p9 to 11

the arbitration world might ensure that arbitration opens to the world of non-legal businesses³³². If the arbitration world wishes to encourage a further development of the use of arbitration as a means of settling all sort of disputes, arbitrators will also have to come from different backgrounds with a wider range of knowledge than at present³³³.

Considerable changes have occurred within the last decades in the arbitration world. Many countries have adopted the Model Law either with or without amendments to the text. Newly drafted legislation or rules on arbitration have many similarities without opting out from their intrinsic differences. As mentioned earlier, the trend towards harmonisation of arbitration laws is well under way. This should facilitate the recourse to arbitration and reduce differences in the practice of arbitration. Harmonisation is further demanded by members of the arbitration community in considering the creation of an international body to review the merits of arbitral awards and with jurisdiction to consider the recognition and enforcement of arbitral awards³³⁴ in order to avoid the too often diverging reviews by national courts of different countries³³⁵.

Yes, the future of arbitration seems promising. However, the actors of the arbitration world should be aware of the criticisms and the unhappiness voiced by the business community³³⁶. What triggers the choice of arbitration for the business community lies in several points : the opportunity to choose their judge who will be an expert, which also takes the risk out of which judge they might get in national courts; arbitrations allow some degree of confidentiality and it is also an attractive

³³² It is true that arbitration does not always involve legal issues but it seems that legal issues are the major sources of arbitrations.

³³³ Arbitrators are the usual all-round international business lawyers, who sit most of the time in commercial cases (from either private practice or sometimes from the academic world). It is quite unusual for non-lawyers to act as arbitrators unless the parties are specially required so in their arbitration agreement. Sometimes, the issues in contention require further knowledge in economics or other field different than law.

³³⁴ WERNER J. The Trade Explosion and Some Likely Effects on International Arbitration in 14 Journal Int. Arb. 1997. 5 at p12 to 15

³³⁵ There are disparities between the ways national courts of a country A and a country B may deal with the setting aside of arbitral awards as underlined by E. SCHWARTZ A Comment on Chomalloy : Hilmarton, à l'Américaine in 14 Journal Int. Arb. 1997. 125

³³⁶ Speeches given by Mr S. Tombs Frias (architect) Secretary of the Royal Incorporation of Architects in Scotland and Mr P. Anderson (insurance industry) given at the *Business Law and Practice of Dispute Disposal* Conference taking place in the Holiday Inn Crown Plaza on the 13th and 14th May 1996 at Edinburgh. Speech from Mr A. Webb (BG plc) given at the Colloquium of the Franco British Lawyers Society : *Justice and Money* at the Town House Inverness 11th to 13th September 1997

option when the parties are working in countries with no effective legal system ; arbitration clauses can also be useful where it is difficult to reach agreement about which law should apply to govern the contract; arbitration is usually faster than litigation ; arbitration is less confrontational than litigation. Despite its benefits, it appears that arbitration is seriously criticised by the business community which is its main client. The business world complains that arbitration is usually too costly, and too formal with too many rules and heavy procedural requirements to comply with. If arbitration becomes too similar to litigation, it will undoubtedly play against it because arbitration would lose its attraction and its advantages would be disregarded and overwhelmed by its inconvenience. Arbitration should not become a copy of litigation otherwise it will lose its appeal for the business community and subsequently its share of the dispute-resolution market in favour of ADR. A balance between the two extremes of litigation-oriented arbitration, with many strict rules, and a free-style arbitration must be found. For arbitration to fulfil its purpose, i.e. a positive alternative to litigation for the business community, it must co-exist harmoniously with litigation. While solutions are being sought to resolve the problems of the judicial system in many countries in order to reduce delays, improve cost-efficiency, avoid saturation and provide access to justice, the arbitration world should take the complaints voiced by the business community into account, if it is to enjoy a share of the dispute-resolution market.

Conclusion of Thesis

This thesis is at three different levels : it investigates the definition of arbitration and the nature of arbitration in comparison with similar means of disputes resolution; looks at the duties and powers of arbitrators and at the interaction between arbitration and at the interaction between national courts and institutional bodies in arbitration.

The difficulty in providing a definition of the term 'arbitration' means that it is often described but rarely precisely defined, even in statutes. One of the aims of this thesis is to provide as precise a definition of arbitration as possible, contrasting arbitration with other models of dispute resolution. The nature of arbitration, its limits and its intrinsic content are considered.

In dealing with the nature of arbitration, the immunity of arbitrators, valuers and judges was raised. The 1996 Arbitration Act has finally removed the doubt that followed the decision of Sutcliffe and Arenson cases. The House of Lords in these cases drew a line on whether or not to grant the immunity to arbitrators and valuers to finally confirm the extension of immunity to arbitrators, only. A valuer may be sued if he provides a negligent valuation. In comparison, an arbitrator cannot be sued. Arbitrators like judges are granted immunity because they also carry out a quasi-judicial mission. The immunity to arbitrators is more or less based upon the same criteria as the immunity of judges i.e. the need for independence of the judiciary; the need to avoid threats to the judicial decision and the avoidance of the rehearing of actions. Section 29 of the 1996 Arbitration Act gives arbitrators the immunity unless they act in bad faith. Section 29 of the 1996 Arbitration Act only deals with immunity in respect of the matter done or omitted in the discharge or purported of his function. Therefore it is not possible to sue an arbitrator unless one can prove that he acted with bad faith in the course of his mission.

The ADR acronym means alternative dispute resolution. Originally, ADR did include arbitration. The development of ADR is the result of inefficiencies that can distort the effectiveness of the state courts system arising from unnecessary delays in

the handling of the case load, excessive expenses for litigants and the reduced efficiency of this system. In the light of the evolution of arbitration, its growing similarity with litigation due to cumbersome procedures if done as a copy of litigation, its increasing costs and its delays either from the parties with dilatory recourse to national courts or from members of the arbitral tribunals or an institution in charge of administering the arbitration on behalf of the parties, then ADR have certainly increased its positive attraction for potential users. Arbitration can nonetheless offer a positive asset in comparison to ADR that is a binding decision (i.e. either interim or final award) whose implementation and enforcement by the parties is generally done. If parties initiate an arbitration, it is sometimes conceived as a bargaining tool with a view to reach a settlement. The parties may see arbitration as a bargaining mechanism because once initiated, the machine is on the way and it should proceed towards a binding decision (i.e. an interim or final award). If not, then the parties would have decided to stop the arbitration procedure because a settlement has been reached.

Is the parallel development between ADR and arbitration detrimental to arbitration ? It seems that the arbitration community takes into account the customers' complaints and criticisms and makes both arbitration law and arbitration rules evolving towards more efficient arbitral proceedings, with less strict rules than in litigation, arbitration should still be positive alternative state courts. Considering that ADR is only advisory whereas arbitration offers a binding decision, the choice between the two means of settling disputes will be made according to which the nature of the parties' decision is wanted. The parties are free to accept or not the ADR decision and they are not bound by it. Depending upon the nature of the result, if the decision must be binding or not, the choice between ADR and arbitration will be made on this point.

Another objective is to describe and analyse the powers and duties of arbitrators in the light of the three legal systems and the ICC Rules. The result is fascinating and in ways unexpected. Arbitrators have greater powers now than they used to have in the past. Their powers are even greater than the powers of the judiciary in certain fields, because arbitrators are sometimes given powers that judges do not yet possess and in addition are not restricted by court based-rules of evidence and procedure. An overview of their powers and duties shows resemblance and divergence between the texts under study.

The increase in the number and scope of the arbitrators' powers results from the constant development of arbitration practice. In both domestic and international cases, arbitrators are facing new situations, and need further powers to meet the parties' needs and wishes. With extended powers, the arbitrators' mission is facilitated. New powers have been integrated in newly adopted arbitration legislation.

For example, statutes made twenty years ago did not or rarely included specific provisions stipulating that arbitrators may award interest either simple or compound. When such a need occurred in the course of an arbitration, if the parties did not have expressly stipulated such a power in their arbitration agreement or if such power was not envisaged at the outset of the arbitration or during a preliminary hearing, then difficulties might arise. Thus it is better to have such a power. When arbitrators are lacking specific powers this might undermine their mission.

By giving arbitrators further powers, arbitration has become more effective. Recourse to national courts to complement the arbitrators' lack of powers has been consequently reduced and arbitration has become faster. By reducing the number of occasions when parties and arbitrators ask national courts to assist the arbitral process to get on track, to complement the arbitrator's lack of powers or to enforce their decision, arbitration becomes a more independent method of settling disputes.

The increase in powers responds positively to the arbitrators' needs and to the parties' needs and wishes. Arbitrators have now better instruments to facilitate their mission. New situations will constantly appear requiring new additional powers, therefore this tendency will probably continue.

The numerous duties imposed on arbitrators either by national legal systems or institutional rules or the parties aim at ensuring the efficient functioning of the arbitral process, the fair treatment of the parties, the enforceability and the recognition of the final award. The increase in duties is also directly consequent on the increase in the arbitrators' powers. Giving extensive powers is one thing, but ensuring that arbitration abides by the rules of justice and complies with the parties' rights, means that further duties need to be imposed.

The final goal was to investigate the relationship between national courts and institutional bodies with arbitration. The recourse to national courts is usually aiming at helping its good functioning, that the arbitral tribunal is properly constituted, ensuring that the arbitration is properly initiated, that its problems are solved and finally that interim and final awards are implemented and enforced. The current rationale is therefore to provide national courts with a supportive, assisting and enforcing role, whereby certain of their powers and competence may be called upon

to assist the smooth and effective course of the arbitral process or to enforce the arbitral award. The corrective role of national courts should not be forgotten. It is a necessary tool in ensuring the enforcement of arbitral awards after their careful scrutiny to ensure that they meet requested criteria and that arbitration has been properly done. Institutional bodies have competence of particular type, which helps institutional arbitrations under their auspices to function properly.

The relationship between national courts and arbitration used to be tainted with suspicion. The obtrusive and unwarranted judicial intervention in the arbitral process or its unnecessary supervision was viewed with dislike and scepticism. Members of the international business community would refuse to enter into arbitration agreements that would have the seat of the arbitration in a country where national courts were too intrusive in the arbitral process. By changing attitude, a country can attract the business community and transform its forum into a better venue for arbitration. Nowadays, national courts have a limited scope for interference in arbitration. Their intervention makes arbitration more efficient by complementing the gap due to the consensual origin of the arbitrators' powers. National courts assistance is an intelligent helping hand, because national courts assist the arbitral process at the outset, during and after its completion. Suspicion and intrusion have now been successfully turned into a positive partnership. Arbitration has become more effective, faster and less time consuming.

With institutional arbitrations there are always tripartite relationships between arbitrators, national courts and institutional bodies. Sometimes, there are tensions characterising these tripartite relationships, especially between national courts and institutional bodies when national courts try to over-intervene in institutional arbitration rather than assist them. Fortunately, this is not the majority of cases. National courts nowadays assist arbitrations whether *ad hoc* or institutional with the same spirit of positive partnership.

Considering that most national legislation on arbitration are more and more friendly towards arbitration, ensuring that state courts have a positive partnership with arbitration i.e. a supportive, assisting and enforcing role and no longer a negative role, the impact on institutional arbitrations might be negative. To justify the high administrative expenses requested to the parties and the costs of running arbitration, arbitral institutions should really propose a service of excellence (i.e. advising the parties, their counsel and arbitrators in handling the arbitration procedure) so that the

parties would accept the costs of their institutional arbitration. To secure their share of the arbitration market, institutions should remain more attractive if they want the parties to pay substantive sums of money for a service. Arbitral institutions must remain a service provider, but above all that must be a service of excellence so they can survive.

With the increasing world trade and the flourishing development of investments on a world wide basis, there will be a growth in the number of disputes which could be resolved by arbitration, consequently, the future of arbitration seems to be promising. To attract more customers, arbitration must continue evolving and better answering the need of the parties.

Appendix 1 - ICC Data*

1 Origin of the Parties

As shown in Fig. 1, universality is the striking characteristic of the origin of the parties in ICC arbitrations held over the last twenty years.

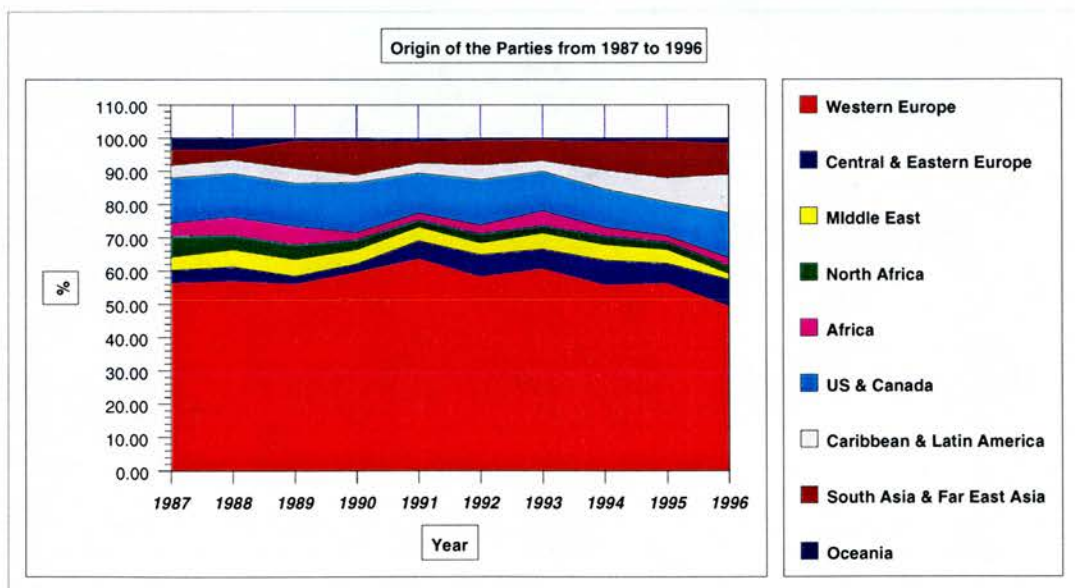


Figure 1: The Origin of the Parties from 1987 to 1996

Originally, private western European companies were the most common type of party. In the last five years, there has been a growing participation of com-

*The data were obtained by the Secretariat of the ICA during my internship in 1997

panies from the Asian-Pacific region and a subsequent reduction of participation from African parties. We can see increased involvement recently from Central and Eastern Europe and from South American region. Governmental and quasi-governmental organisations were also highly involved in ICC arbitrations.

2 Number of Cases

The ICC arbitration case-load has constantly increased since its founding in 1923, as shown in Fig. 2. Between 1923 and 1980, the ICC received 4000 cases. Since 1980, the demand for ICC arbitrations has more than doubled to reach more than 9000 cases handled by the ICA and its secretariat. In the eighties, the ICA usually received approximately 300 demands per year, while in the nineties, the ICA has received over 360 demand per year. Since 1995, the average has increased to 430 demand per year. At the beginning of 1997, the total number of ICC arbitrations handled by both the Secretariat and the ICA has exceeded 9400 cases.

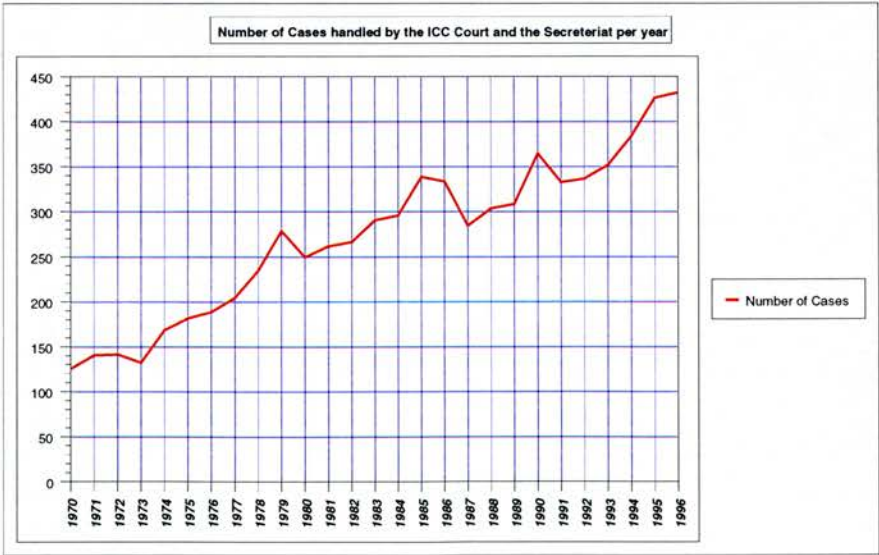


Figure 2: The number of cases between 1970 and 1996

Such a trend is also obvious if one considers the work load of one team of the Secretariat (the team of Mrs. Lagace Glain) in 1995, this team was handling an average of 145 cases per month among which 116 cases on average were active; in 1996 the monthly average of cases was 148 cases, among which 112 were active. For January and February 1997, this team had 150 cases among which 117 were active.

3 Nationality of Arbitrators

The nationalities of the arbitrators involved in the ICC arbitrations are shown in Fig. 3.

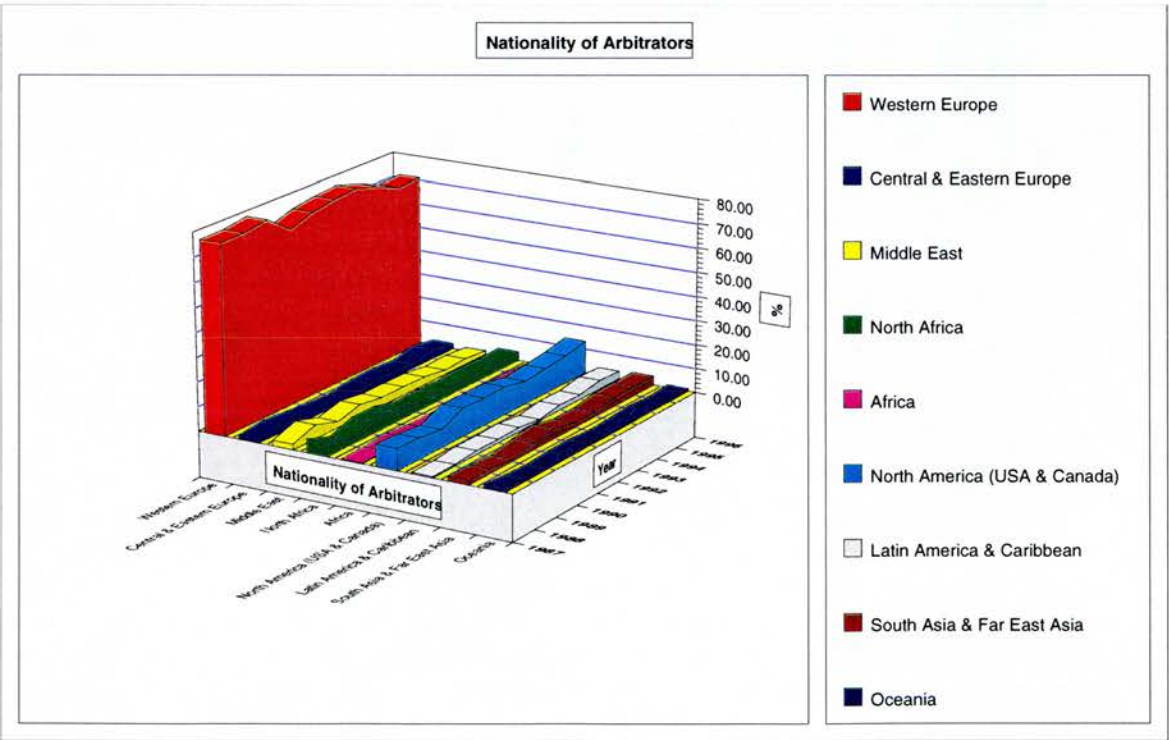


Figure 3: The Nationality of the Arbitrators from 1987 to 1996

Until now, the vast majority of arbitrators are nationals from western Europe

with a comfortable average between 77% to 70% in the last two years. Arbitrators from North America represent the second group with a growing average between 8,9% to 13,2% in the last two years. The other group of arbitrators who are nationals from South America and South Asia and Far East Asia have been increasingly appointed, this is due to the increasing importance of parties from these two regions in the world.

4 Economic Activity Distribution

The range of economic activities in the ICC arbitration is shown in Fig. 4.

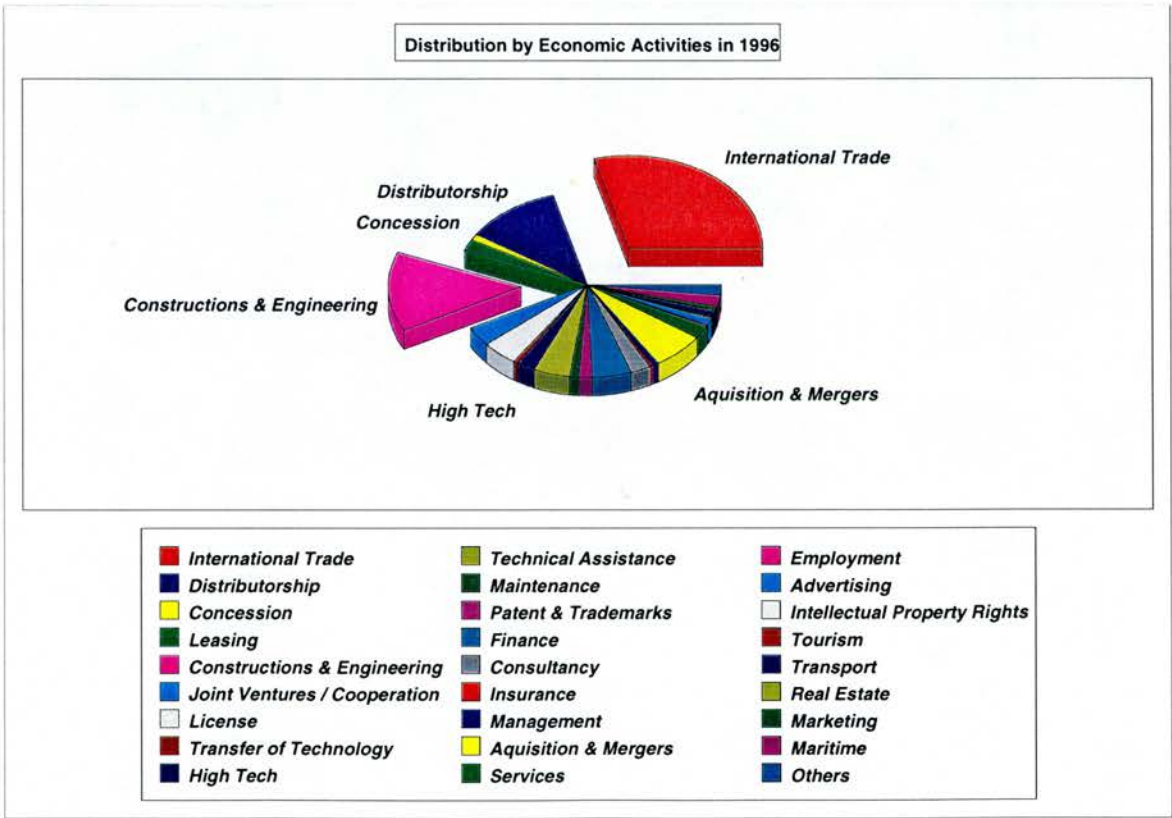


Figure 4: Distribution of Cases by Economic Activities in 1996

There is a wide range of economic activities in ICC arbitrations. For 1996,

the bulk of cases involving international trade represents 29%, constructions and engineering represent 14%, joint ventures and cooperations represent 11.6%, and acquisitions and mergers represent 6.3% of the cases. Cases involving contracts in relation to joint ventures are at 4.5%, licences at 4.5%, know-how at 4.4%, finance at 4.8% and consultancy at 2.5%. In the past decade, the percentages were more or less similar to the ones presented for 1996.

5 Cases involving 1 or 3 Arbitrators

The majority of cases is considered by a three-man arbitral tribunal, as shown in Fig. 5. The proportion of cases submitted to three arbitrators (approximately 60%) and to a sole arbitrator (approximately 40%) has remained unchanged since 1987.

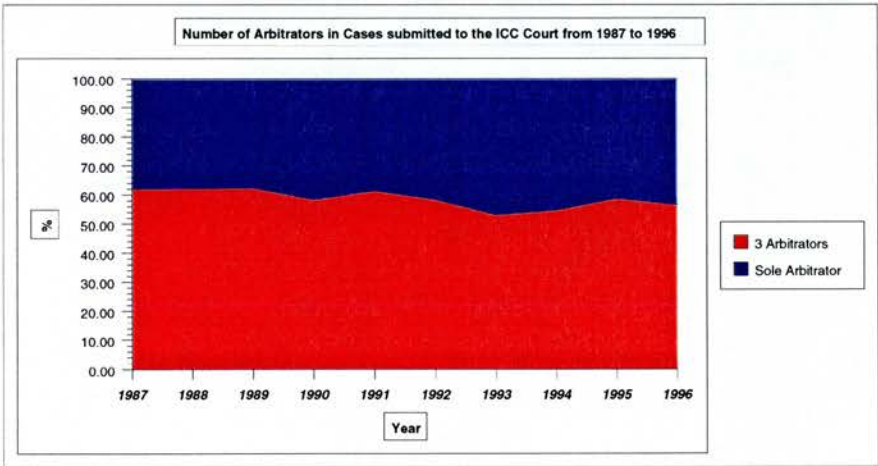


Figure 5: Number of Arbitrators in the cases from 1987 to 1996

In practice, the parties agree on the number of arbitrators either in the underlying contract or after the dispute has arisen in approximately 70% of the case. Failing an agreement between the parties, the ICA usually tends to designate a sole arbitrator where the amounts are relatively small (usually under the

threshold of 1 million US \$) and where the issues do not appear to be particularly complex and where the atmosphere between the parties is not too bad and where one party fails to participate into the arbitration and refuses to pay the costs of arbitration.

6 Place of Arbitration

The vast majority of the place of arbitration are located in western Europe, as shown in Fig. 6.

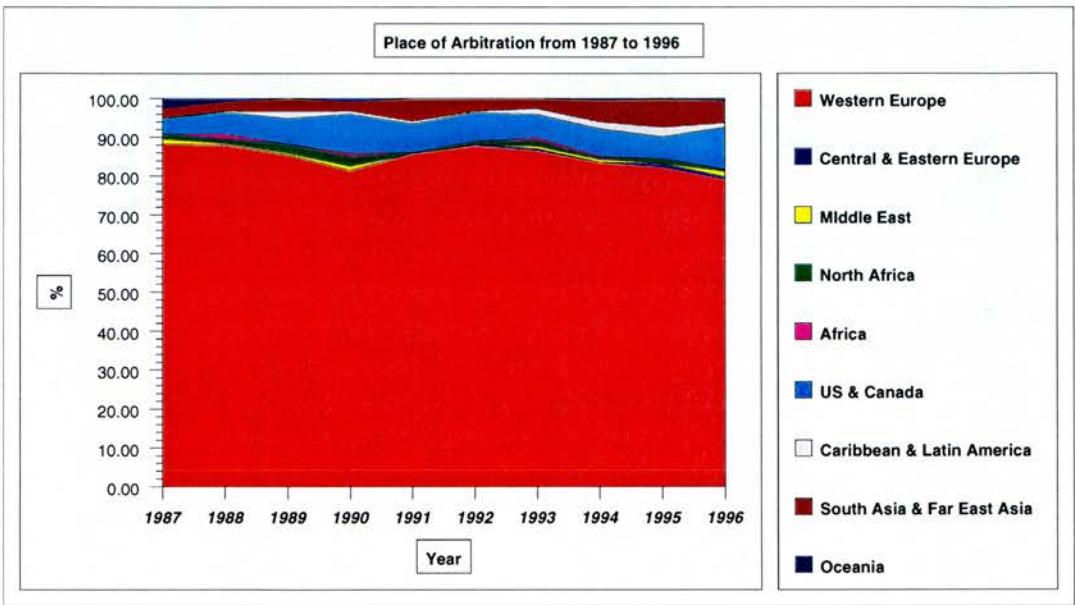


Figure 6: The Place of Arbitration from 1987 to 1996

The parties to ICC arbitration usually agree on the place in arbitration in their underlying contract. Failing an agreement between the parties after the dispute has arisen, the ICA will choose a place of arbitration in accordance with the origin of the parties, also in taking into account the travel costs for the parties, the members of the arbitral tribunal, the parties or advisers, the experts and so on.

7 Amount in Dispute

The amount in dispute for ICC arbitrations covers a wide range from US \$50,000 to over US \$1 billion, as shown in Fig. 7. The majority of cases involves US \$1 to \$10 million; in 1996, 36.8% of cases, in 1995, 37.1% and in 1993, 40%.

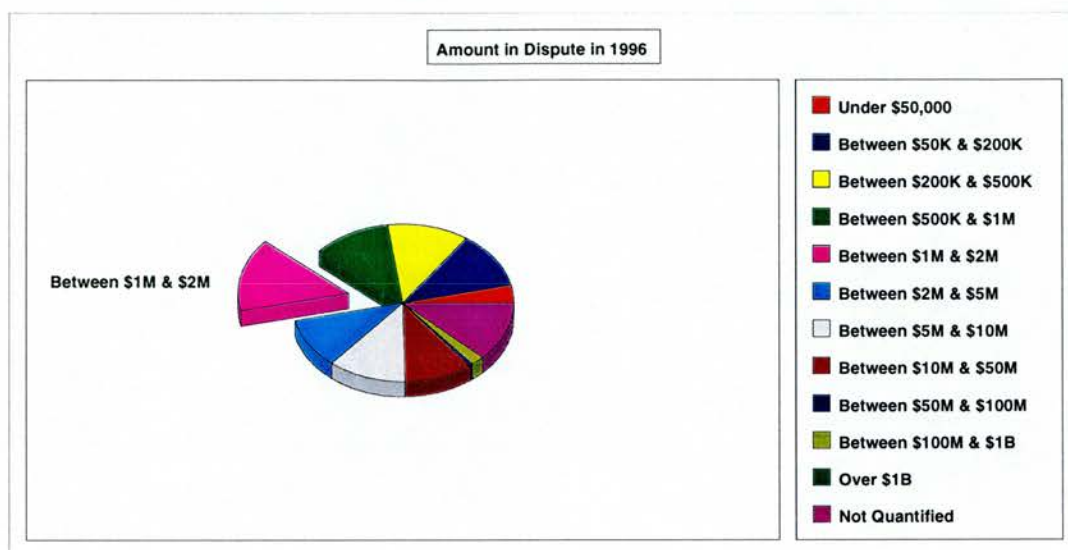


Figure 7: The Amount in Dispute in 1996

About 45% to 50% of cases are over US \$1 million. The percentage varies between 49% in 1995, 48.8% in 1996 and 52% in 1993. There is a sensible increase in cases where claims are not quantified : 8.1% in 1993, 11.7% in 1995, 12.2% in 1996.

Appendix 2 : A comparison between arbitration, conciliation and mediation : their differences and similarities

Arbitration	Mediation	Conciliation
- To have a decision which will be implemented by the parties to arbitration	-To help the parties to reach an agreed settlement.	-To bring and draw up an agreement designed to be a fair compromise.
-agreement to arbitrate is either for an existing dispute or a future dispute -it is binding on the parties	-the agreement is simply a declaration of intent that does not oblige the parties to refer their dispute.	-the agreement is simply a declaration of intent that does not oblige the parties to refer their dispute.
-selection of arbitrator (s) done by the parties if there is need national courts or institutions can help.	- selection of mediator by the parties or by an institution	-selection of conciliator by the parties or by an institution.
- his role is similar to a judicial function.	- he is a neutral third party and he has an advisory role	- he is a neutral third party.
- he investigates the facts of the case in order to decide it. - he has similar power with those of a judge but no coercive powers. -the powers are limited by arbitration agreement, national constraints and by the parties.	- he investigates the facts of the case, he recommends, and makes proposals. - he helps the parties to talk to each other to reach an agreement. - he interprets their concerns, he relays their information. -he re-focuses the problem.	- he investigates the facts of the case and he attempts to reconcile the opposing views of the parties and prompts them to formulate their own proposals. - he defines the strong and weak points of each party. - he acts as catalyst for the settlement of the dispute.
- the parties or arbitrators choose the procedure.	- the procedure is agreed by the parties	- the procedure is agreed by the parties
- he has an entire discretion as to the procedure and any related matters, if not done by the parties. But some mandatory rules must be complied with. -expert opinion, inspection of subject matter	-he can choose between the discovery of documents. - he calls for meetings with the parties together and with each party alone. -expert opinion, inspection of subject matter	- he calls for oral hearings with the parties together and with each party alone. -expert opinion, inspection of subject matter
- he imposes his decision on the parties	-he cannot compel the parties to reach an agreement	-he has no power to impose his decision on the parties
the arbitration success does not depends on the parties	-its success depends on the desire of the parties to reach an agreement	-its success depends upon the parties' willingness to conclude an agreement

Appendix 3 : Glossary of French terms

Appeal = Appeal to the Supreme Court (*pourvoi en cassation*) cannot be exercised for arbitral awards because it is reserved for decisions which have been rendered by a first instance and later by an appeal court.

Assignation = writ of summons

Astreinte = a daily fine for delay in the performance of an obligation or payment of a debt for instance

Autorité de la chose jugée = Res Judicata

Avocat = who assists and represents a party in court

Avoué = lawyer who pleads before the Appeal Court

Code Civil or CC = Civil Code

Conclusions = pleadings

Condamnation aux dépens = payments of costs incurred during the trial that the winning party may ask the losing party to pay.

Constitution = basic text which sets out the structure and function of public powers (le Président de la République, du Parlement, du Gouvernement). It also contains reference to Human Rights, Rights of the individual.

Constitution d'avocat = appointment of a lawyer

Cour d' Appel (CA) = Appeal Court

Cour de Cassation = the French Supreme Court which sits in Paris. Its role is to ensure that the rule of law is observed by inferior courts. Therefore, it only deals with the points of law but not with the facts of the case and examines whether the law has been properly applied to the facts. If it considers that the inferior courts properly applied the points of law, it rejects the appeal whereas if it considers that inferior courts wrongly applied the points of law, it quashes the challenged decision and remits it to another Appeal Court.

Décret = decree

Défence au fond = plea on the merits for defendant

Délibération = discussion between judges to reach a judgement behind closed doors

Demande additionnelle = amendment

Demande incidente = incidental claim

Demande introductive d'instance = writ of summons

Demande principale = original claim

Demande reconventionnelle = counterclaim

Dol = fraud. If a contract is concluded between the parties with a mistake it will be void.

Dommages et intérêts = damages

Enquête ou Commission rogatoire = oral evidence of a witness taken by a judge.

Erreur = mistake. If a contract is concluded between the parties with a mistake it will be void.

Exequatur = A judicial authorisation to enforce an arbitral award. With a view to transforming arbitral awards into enforceable decisions, French courts will undertake a scrupulous review of foreign and international arbitral awards.

Expertise = valuation

Expertise amiable = it is the result of a convention signed between the parties requiring an expertise with the aim to inform the parties on a specific matter. It has its source in an agreement freely signed by the parties before or after the dispute arose. The amicable expert is a person with a good knowledge in a given field and who will be chosen out of a list of judicial experts. It does not have a legal existence, it has just been created for practical reason. The amicable expert is free to respect the rules of the civil procedure or not.

Expertise judiciaire = it has a legal basis which can be found from article 232 to article 284 of the New Code of Civil Procedure. Under article 232 NCPC, a judicial expert, designated by a judge, gives an opinion not binding on this judge. The judge has an entire discretion to refer the matter to expertise if he deems it necessary in order to make up his mind. When appointing this judicial expert, the judge defines his mission with accuracy, and determines the time-limit for the *expertise* to be performed. When the judicial expert is acting, he enjoys a real independence. His opinion is given either orally by the expert to the Court or is subject to a written report. The expert's opinion is only aiming at helping the judge to make up his mind. The judicial expert is an auxiliary of the judge.

Incident de vérification = a claim relating to the verification of a writing or falsification of a document

Injonction de faire = mandatory injunction

Instance = proceedings

Juge de l'exécution = a judge who is responsible for enforcing judgements passed by French courts.

Juge de la mise en état = a preparatory judge who is responsible to prepare the case before it can go before a three men tribunal for its hearing.

Juge des Référés = a judge, usually the president of a TGI, renders a quick decision and may order urgent, interim or provisional measures.

Loi = written law passed by the Parliament (*Assemblée Nationale* and *le Sénat*)

Magistrat = a judge sitting in a court

Mesure conservatoire = measure intended to prevent an imminent damages from occurring or to stop disorders. It is also granted by the Président of the TGI.

Nouveau Code de Procédure Civile or *NCPC* = New Code of Civil Procedure

Opinion dissidente = dissenting opinion

Opposition = it is an appeal available to those parties against whom default judgement has been passed. Opposition is excluded because of the contractual nature of arbitral proceedings. It is an appeal against a default judgement. The defaulting party lodges an appeal before the judge who has rendered the decision in question. The defaulting party will be able to present its case, to be heard by the judge, to state its argument which was not possible before.

Ordonnance de clôture = closing order

Ordonnance de référé = interlocutory order

Plaidoirie = oral argument

Pourvoi en cassation = appeal of an Appeal Court's decision

Principe du contradictoire = the adversarial principle, a fundamental principle of French law embodied in the maxim 'auditor et altera pars', laid down in articles 14, 15, 16 and 17 of the New Code of Procedure. This implies that both parties must be given a fair opportunity to be heard (article 14 NCPC), that each party must have the opportunity to examine, discuss the claim, arguments, considerations and evidence put forward by the other party (article 15), that judges must comply with this principle and make it observed by parties (article 16), that judges must decide after having invited the parties to submit their views (article 16 NCPC).

Principes directeurs du procès = general principles which are laid down in the first few articles of the New Code of Civil Procedure. Article 1 NCPC stipulates that the parties alone institute the proceedings. Except in the cases where the law provides otherwise, the parties are free to put an end to the proceedings before they are terminated by the effect of judgment or by virtue of law. Under this article, the parties institute their arbitral proceedings, conduct them, and may stop them. For an international arbitration to end, an arbitral tribunal must render its final award. Article 2 NCPC stipulates that the parties conduct the proceedings in the form and within the delays required and they have to do whatever is necessary for the smooth functioning of these proceedings. Thus the parties possess the capacity to initiate, carry out and stop their proceedings. Article 3 NCPC requires the judge to ensure that the

proceedings are properly conducted. He can establish delays and order the necessary measures. With this article, legislators intend to offset the parties' power by allowing the judge to ensure that the parties respect the guiding principles. Article 4 NCPC says that the subject-matter of dispute is only determined by the parties' respective claims. Therefore, the parties limit the scope of subject-matter. Article 5 NCPC enshrines the principle that the judge must rule on what is demanded. Article 6 NCPC stipulates that the parties have the burden of alleging the facts proper to founding their claims. Article 7 NCPC provides that a judge may not base his decision on facts which are not presented during the hearing and in conformity with the adversarial process. Nevertheless, a slight difference appears here as a judge is able to take into consideration facts not especially invoked by the parties in support of their claims. With article 8 and 13 NCPC, a judge asks the parties to explain issues of law or explanations of facts, which he deems of relevance, with the view to deciding the dispute in a fair and proper way. Under article 9 NCPC, each party must prove according to the law the facts necessary to prove their claims. Thus the burden of proof is incumbent on the parties. Each party must prove its contentions in order for judge to decide. Under article 10 NCPC, a judge has the power to order all measures of investigation legally permissible the case. The parties are required to participate and provide all information to experts. Article 11 § 1 gives a good deal of information about the judge's power. The judge may require a party who has in its possession proofs to adduce them and if necessary force it to do so as he has coercive power. Articles 14 to 16 inclosure relate to the principle of the adversarial process which has to be complied with during the whole arbitration proceedings. Each party must submit to the other party its facts, its claims, its evidence, in good time for the other party to have the time and the opportunity to prepare its case. A judge must ensure that this principle is observed by the parties and their representatives. With article 21 NCPC, both an arbitrator and a judge have the primary mission to reconcile the parties before going any further in the hearing process.

Procédure de référé = procedure whereby a judge grants urgent, interim or provisional measures.

Provision = provisional payment of a sum of money ordered by the Président of the TGI to a creditor.

Recours en révision = an aggrieved party may appeal a decision in order to have it set aside and have the case retried.

Saisie conservatoire = attachment directed to preserving assets without the opposing party being informed. This is an order granted by the Président of the TGI

Témoignage = testimony of witness

Tierce opposition = it is intended to protect third parties from the effect of a judgement which they have not been party to or represented in, which might cause them prejudice.

Tribunal de Commerce (TC) = Commercial Court. It is an old institution which survived the French Revolution. Commercial Courts are specialised courts which are competent to try all disputes between individuals involving commercial transactions.

Tribunal de Grande Instance (TGI) = Court of First Instance. It is a court of general jurisdiction. It has jurisdiction to try any private law case within the limits of its territorial jurisdiction. It enjoys special and exclusive jurisdiction in certain matters such as marriage, divorce, filiation, immovable property and so on. It is organised according to the principle of *collégialité* (under that principle ordinary cases are adjudicated by a three men tribunal). Big-sized TGI are divided in *chambres* (divisions). In general, there is a TGI per *départements* located in its main town.

Violence = violence. If a contract is concluded between the parties with a mistake it will be void.

Appendix 4 : French Legislation

Nouveau Code de Procédure Civile

- *Les conventions d'arbitrage*

Chapitre Ier : *La clause compromissoire*

Article 1442 : La clause compromissoire est la convention par laquelle les parties à un contrat s'engagent à soumettre à l'arbitrage les litiges qui pourraient naître relativement à ce contrat.

Article 1443 : La clause compromissoire doit à peine de nullité, être stipulée par écrit dans la convention principale ou dans un document auquel celle-ci se réfère. Sous la même sanction, la clause compromissoire, doit, soit désigner le ou les arbitres, soit prévoir les modalités de leur désignation.

Article 1444 : Si, le litige né, la constitution du tribunal se heurte à une difficulté du fait de l'une des parties ou dans la mise en oeuvre des modalités de désignation, le président du tribunal de grande instance désigne le ou les arbitres. Toutefois, cette désignation est faite par le président du tribunal de commerce si la convention l'a expressément prévu. Si la clause compromissoire est soit manifestement nulle, soit insuffisante pour permettre de constituer le tribunal arbitral, le président le constate et déclare n'y avoir lieu à désignation.

Article 1445 : Le litige est soumis au tribunal arbitral soit conjointement par les parties, soit par la partie la plus diligente.

Article 1446 : Lorsqu'elle est nulle, la clause compromissoire est réputée non écrite.

Chapitre II : *Le compromis*

Article 1447 : Le compromis est la convention par laquelle les parties à un litige né soumettent celui-ci à l'arbitrage d'une ou plusieurs personnes.

Article 1448 : Le compromis doit, à peine de nullité, déterminer l'objet du litige. Sous la même sanction, il doit soit désigner le ou les arbitres, soit prévoir les modalités de leur désignation. Le compromis est caduc lorsqu'un arbitre qu'il désigne n'accepte pas la mission qui lui est confiée.

Article 1449 : Le compromis est constaté par écrit. Il peut l'être dans un procès-verbal signé par l'arbitre et les parties.

Chapitre III : *Règles communes*

Article 1451 : La mission d'arbitre ne peut être confiée qu'à une personne physique ; celle-ci doit avoir le plein exercice de ses droits civils. Si la convention d'arbitrage désigne une personne morale, celle-ci ne dispose que du pouvoir d'organiser l'arbitrage.

Article 1452 : La constitution du tribunal arbitral n'est parfaite que si le ou les arbitres acceptent la mission qui leur est confiée. L'arbitre qui suppose en sa personne une cause de récusation doit en informer les parties. En ce cas, il ne peut accepter sa mission qu'avec l'accord de ces parties.

Article 1453 : Le tribunal arbitral est constitué d'un seul arbitre ou de plusieurs en nombre impair.

Article 1454 : Lorsque les parties désignent les arbitres en nombre pair, le tribunal arbitral est complété par un arbitre choisi, soit conformément aux prévisions des parties, soit, en l'absence de telles prévisions, par les arbitres désignés, soit à défaut d'accord entre ces derniers, par le président du tribunal de grande instance.

Article 1455 : Lorsqu'une personne physique ou morale est chargée d'organiser l'arbitrage, la mission d'arbitrage est confiée à un ou plusieurs arbitres acceptés par toutes les parties. A défaut d'acceptation, la personne chargée d'organiser l'arbitrage invite chaque partie à désigner un arbitre et procède, le cas échéant, à la désignation de l'arbitre nécessaire pour compléter le tribunal arbitral. Faute pour les parties de désigner un arbitre, celui-ci est désigné par la personne chargée d'organiser l'arbitrage. Le tribunal arbitral peut aussi être directement constitué selon les modalités prévues à l'alinéa précédent. La personne chargée d'organiser l'arbitrage peut prévoir que le tribunal arbitral ne rendra qu'un projet de sentence et que si ce projet est contesté par l'une des parties, l'affaire sera soumise à un deuxième tribunal arbitral. Dans ce cas, les membres du deuxième tribunal sont désignés par la personne chargée d'organiser l'arbitrage, chacune des parties ayant la faculté d'obtenir le remplacement d'un des arbitres ainsi désignés.

Article 1456 : Si la convention d'arbitrage ne fixe pas le délai, la mission des arbitres ne dure que six mois à compter du jour ou le dernier d'entre eux l'a acceptée. Le délai légal ou conventionnel peut être prorogé soit par accord des parties, soit à la demande de l'une d'elles ou du tribunal arbitral, soit par le président du tribunal de grande instance ou le cas visé par l'article 1444, alinéa 2, par le président du tribunal de commerce.

Article 1457 : Dans les cas prévus aux articles 1444, 1454, 1456, et 1463, le président du tribunal, saisi comme en matière de référé par une partie ou par le tribunal arbitral, statue par ordonnance non susceptible de recours. Toutefois, cette ordonnance peut être frappée d'appel lorsque le président déclare n'y avoir lieu à désignation pour une des causes prévues à l'article 1444 (alinéa 3). L'appel est formé, instruit et jugé comme en matière

de contredit de compétence. Le président compétent est celui du tribunal qui a été désigné par la convention d'arbitrage ou, à défaut, celui dans le ressort duquel cette convention a situé les opérations d'arbitrage. Dans le silence de la convention, le président compétent est celui du tribunal du lieu ou demeure le ou l'un des défendeurs à l'incident ou, si le défendeur ne demeure pas en France, celui du tribunal du lieu ou demeure le demandeur.

Article 1458 : Lorsqu'un litige dont un tribunal arbitral est saisi en vertu d'une convention d'arbitrage est porté devant une juridiction d'état, celle-ci doit se déclarer incompétente. Si le tribunal arbitral n'est pas encore saisi, la juridiction doit se déclarer incompétente à moins que la convention d'arbitrage ne soit manifestement nulle. Dans les deux cas, la juridiction ne peut relever d'office son incompétence.

Article 1459 : Toute disposition ou convention contraire aux règles édictées par le présent chapitre est réputée non écrite.

Titre II : L'instance Arbitrale

Article 1460 : Les arbitres règlent la procédure arbitrale sans être tenus de suivre les règles établies pour les tribunaux, sauf si les parties en ont autrement décidé dans la convention d'arbitrage. Toutefois, les principes directeurs du procès énoncés aux articles 4 à 10, 11 (alinéa 1) et 13 à 21 sont toujours applicables à l'instance arbitrale. Si une partie détient un élément de preuve, l'arbitre peut aussi lui enjoindre de le produire.

Article 1461 : Les actes de l'instruction et les procès-verbaux sont fait par tous les arbitres si le compromis ne les autorise à commettre l'un deux. Les tiers sont entendus sans prestation de serment.

Article 1462 : Tout arbitre doit poursuivre sa mission jusqu'au terme de celle-ci. Un arbitre ne peut être révoqué que du consentement unanime des parties.

Article 1463 : Un arbitre ne peut s'abstenir ni être récusé que pour une cause de récusation qui se serait révélée ou serait survenue depuis sa désignation. Les difficultés relatives à l'application du présent article sont portés devant le président du tribunal compétent.

Article 1464 : L'instance arbitrale prend fin, sous réserve des conventions particulières des parties : 1) Par la révocation, le décès ou l'empêchement d'un arbitre ainsi que la perte du plein exercice de ces droits civils; 2) Par l'abstention ou la récusation d'un arbitre; 3) Par l'expiration du délai d'arbitrage.

Article 1465 : L'interruption de l'instance arbitrale est régie par les dispositions des articles 369 à 376.

Article 1466 : Si, devant l'arbitre, l'une des parties conteste dans son principe ou son étendue le pouvoir juridictionnel de l'arbitre, il appartient à celui-ci de statuer sur la validité ou les limites de son investiture.

Article 1467 : Sauf convention contraire, l'arbitre a le pouvoir de trancher l'incident de vérification ou de faux conformément aux dispositions des articles 287 à 294 et de l'article 299. En cas d'inscription de faux incidente, l'article 313 est applicable devant l'arbitre. Le délai d'arbitrage continue à courir du jour où il a été statué sur l'incident.

Article 1468 : L'arbitre fixe la date à laquelle l'affaire sera mise en délibéré. Après cette date, aucune demande ne peut être formée ni aucun moyen soulevé. Aucune observation ne peut être présentée ni aucune pièce produite, si ce n'est à la demande de l'arbitre.

Titre III : La Sentence Arbitrale

Article 1469 : Les délibérations des arbitres sont secrètes.

Article 1470 : La sentence arbitrale est rendue à la majorité des voix.

Article 1471 : La sentence arbitrale doit exposer succinctement les prétentions des parties respectives des parties et leurs moyens. La décision doit être motivée.

Article 1472 : La sentence arbitrale contient l'indication : du nom des arbitres qui l'ont rendue ; de sa date ; du lieu où elle est rendue ; des noms, prénoms ou dénominations des parties, ainsi que de leur domicile ou siège social ; le cas échéant, du nom des avocats ou de toute personne ayant représenté ou assisté les parties.

Article 1473 : La sentence arbitrale est signée par tous les arbitres. Toutefois si une minorité d'entre eux refuse de la signer, les autres en font mention et la sentence a le même effet que si elle avait été signée par tous les arbitres.

Article 1474 : L'arbitre tranche le litige conformément aux règles de droit, à moins que, dans la convention d'arbitrage, les parties ne lui aient conféré mission de statuer comme amiable compositeur.

Article 1475 : La sentence dessaisit les arbitres de la contestation qu'elle tranche. L'arbitre a néanmoins le pouvoir d'interpréter la sentence, de réparer les erreurs et omissions matérielles qui l'affectent et de la compléter lorsqu'il a omis de statuer sur un chef de demande. Les articles 461 à 463 sont applicables. Si le tribunal arbitral ne peut être à nouveau réuni, ce pouvoir appartient à la juridiction qui eut été compétente à défaut d'arbitrage.

Article 1476 : La sentence arbitrale a, dès qu'elle est rendue, l'autorité de la chose

jugée relativement à la contestation qu'elle tranche.

Article 1477 : La sentence arbitrale n'est susceptible d'exécution forcée qu'en vertu d'une décision du tribunal de grande instance dans le ressort duquel la sentence a été rendue. L'exéquatur est ordonné par le juge de l'exécution du tribunal. A cet effet, la minute de la sentence accompagnée d'un exemplaire de la convention d'arbitrage est déposée par l'un des arbitres ou par la partie la plus diligente au secrétariat de la juridiction.

Article 1478 : L'exéquatur est apposé sur la minute de la sentence arbitrale. L'ordonnance qui refuse l'exéquatur doit être motivée.

Article 1479 : Les règles sur l'exécution provisoire des jugements sont applicables aux sentences arbitrales. En cas d'appel ou de recours en annulation, le premier président ou le magistrat chargé de la mise en état des lors qu'il est saisi, peut accorder l'exéquatur à la sentence arbitrale assortie de l'exécution provisoire. Il peut aussi ordonner l'exécution provisoire dans les conditions prévues aux articles 525 et 526 ; sa décision vaut exéquatur.

Article 1480 : Les dispositions des articles 1471 (alinéa 2), 1472, en ce qui concerne le nom des arbitres et la date de la sentence, et 1473 sont prescrites à peine de nullité.

Titre IV : Les Voies de Recours

Article 1481 : La sentence arbitrale n'est pas susceptible d'opposition ni de pourvoi en cassation. Elle peut être frappée de tierce opposition devant la juridiction qui eut été compétence à défaut d'arbitrage, sous réserve des dispositions de l'article 588 (alinéa 1).

Article 1482 : La sentence arbitrale est susceptible d'appel à moins que les parties n'aient renoncé à l'appel dans la convention d'arbitrage. Toutefois, elle

n'est pas susceptible d'appel lorsque l'arbitre a reçu mission de statuer comme amiable compositeur, à moins que les parties n'aient expressément réservé cette faculté dans la convention d'arbitrage.

Article 1483 : Lorsque suivant les distinctions faites à l'article 1482, les parties n'ont pas renoncé à l'appel, ou qu'elles se sont réservées expressément cette faculté dans la convention d'arbitrage, la voie d'appel est seule ouverte, qu'elle tende à la réformation de la sentence arbitrale ou à son annulation. Le juge d'appel statue comme amiable compositeur lorsque l'arbitre avait cette mission.

Article 1484 : Lorsque, suivant les distinctions faites à l'article 1482, les parties ont renoncé à l'appel, ou qu'elles ne se sont pas expressément réservées cette faculté dans la convention d'arbitrage, un recours en annulation de l'acte qualifié sentence arbitrale peut néanmoins être formé malgré toute stipulation contraire. Il est ouvert que dans les cas suivant : 1) Si l'arbitre a statué sans convention d'arbitrage ou sur convention nulle ou expirée; 2) Si le tribunal arbitral a été irrégulièrement composé ou l'arbitre unique irrégulièrement désigné; 3) Si l'arbitre a statué sans se conformer à la mission qui lui avait été conférée; 4) Lorsque le principe de la contradiction n'a pas été respecté; 5) Dans tous les cas de nullité prévus à l'article 1480; 6) Si l'arbitre a violé une règle d'ordre public.

Article 1485 : Lorsque la juridiction saisie d'un recours en annulation annule la sentence arbitrale, elle statue sur le fond dans les limites de la mission de l'arbitre, sauf volonté contraire des parties.

Article 1486 : L'appel et le recours en annulation sont portés devant la cour d'appel dans le ressort duquel la sentence arbitrale a été rendue. Ces recours sont recevables dès le prononcé de la sentence; ils cessent de l'être s'ils n'ont pas été

exercés dans le mois de la signification de la sentence revêtue de l'exéquatur. Le délai pour exercer ces recours suspend l'exécution de la sentence arbitrale. Le recours exercé dans le délai est également suspensif.

Article 1487 : L'appel et le recours en annulation sont formés, instruits et jugés selon les règles relatives à la procédure en matière contentieuse devant le cour d'appel. La qualification donnée par les parties à la voie de recours au moment ou la déclaration est faite peut être modifiée ou précisée jusqu'à ce que la cour d'appel soit saisie.

Article 1488 : L'ordonnance qui accorde l'exéquatur n'est susceptible d'aucun recours. Toutefois, l'appel ou le recours en annulation de la sentence emportent de plein droit, dans les limites de la saisine de la cour, recours contre l'ordonnance du juge de l'exéquatur ou dessaisissement de ce juge.

Article 1489 : L'ordonnance qui refuse l'exéquatur peut être frappée d'appel jusqu'à l'expiration d'un délai d'un mois à compter de sa signification. En ce cas, la cour d'appel connaît, à la demande des parties, des moyens que celles-ci auraient pu faire valoir contre la sentence arbitrale, par la voie de l'appel ou du recours en annulation selon le cas.

Article 1490 : Le rejet de l'appel ou du recours en annulation confère l'exéquatur à la sentence arbitrale ou à celles de ses dispositions qui ne sont pas atteintes par la censure de la cour.

Article 1491 : Le recours en révision est ouvert contre la sentence arbitrale dans les cas et sous les conditions prévues pour les jugements. Il est porté devant la cour d'appel qui eut été compétente pour connaître des autres recours contre la sentence.

Titre V : *L'arbitrage International*

Article 1492 : Est international l'arbitrage qui met en cause des intérêts du commerce international.

Article 1493 : Directement ou par référence à un règlement d'arbitrage, la convention d'arbitrage peut désigner le ou les arbitres ou prévoir les modalités de leur designation. Si pour les arbitrages se déroulant en France ou pour ceux à l'égard desquels les parties ont prévu l'application de la loi de procédure française, la constitution du tribunal arbitral se heurte à une difficulté, la partie la plus diligente peut, sauf clause contraire, saisir le président du tribunal de grande instance de Paris selon les modalités de l'article 1457.

Article 1494 : La convention d'arbitrage peut, directement ou par référence à un règlement d'arbitrage, régler la procédure à suivre dans l'instance arbitrale, elle peut aussi soumettre celle-ci à la loi de procédure qu'elle détermine. Dans le silence de la convention, l'arbitre règle la procédure, autant qu'il est besoin, soit directement, soit par référence, soit par référence à une loi ou un règlement d'arbitrage.

Article 1495 : Lorsque l'arbitrage international est soumis à la loi française, les dispositions des titres I, II, III du présent livre ne s'appliquent qu'à défaut de convention particulière et sous réserve des articles 1493 et 1494.

Article 1496 : L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; à défaut d'un tel choix, conformément à celles qu'il estime appropriées. Il tient compte dans tous les cas des usages du commerce.

Article 1497 : L'arbitre statue comme amiable compositeur si la convention des parties lui a conféré cette mission.

Titre VI : *La Reconnaissance, l'Exécution Forcée et les Voies de Recours à l'égard*

des sentences arbitrales rendues à l'étranger ou en matière d'arbitrage international.

Chapitre I : *La reconnaissance et l'exécution forcée des sentences arbitrales rendues à l'étranger ou en matière d'arbitrage international*

Article 1498 : Les sentences arbitrales sont reconnues en France si leur existence est établie par celui qui s'en prévaut et si cette reconnaissance n'est pas manifestement contraire à l'ordre public international. Sous les mêmes conditions, elles sont déclarées exécutoires en France par le juge de l'exécution.

Article 1499 : L'existence d'une sentence arbitrale est établie par la production de l'original accompagné de la convention d'arbitrage ou des copies de ces documents réunissant les conditions requises pour leur authenticité. Si ces pièces ne sont pas rédigées en langue française, la partie en produit une traduction certifiée par un traducteur inscrit sur la liste des experts.

Article 1500 : Les dispositions des articles 1476 à 1479 sont applicables.

Chapitre II : *Les voies de recours contre les sentences arbitrales rendues à l'étranger ou en matière d'arbitrage international.*

Article 1501 : La décision qui refuse la reconnaissance ou l'exécution est susceptible d'appel.

Article 1502 : L'appel de la décision qui accorde la reconnaissance ou l'exécution n'est ouvert que dans les cas suivants : 1) Si l'arbitre a statué sans convention d'arbitrage ou sur convention nulle ou expirée; 2) Si le tribunal arbitral a été irrégulièrement composé ou si l'arbitre unique irrégulièrement désigné; 3) Si l'arbitre a statué sans se conformer à la mission qui lui avait été conférée; 4) Lorsque le principe de la contradiction n'a pas été respecté; 5) Si la reconnaissance

ou l'exécution sont contraires à l'ordre public international.

Article 1503 : L'appel prévu aux articles 1501 et 1502 est porté devant la cour d'appel dont relève le juge qui a statué. Il peut être formé jusqu'à l'expiration du délai d'un mois à compter de la signification de la décision du juge.

Article 1504 : La sentence arbitrale rendue en France en matière d'arbitrage international peut faire l'objet d'un recours en annulation dans les cas prévus à l'article 1502. L'ordonnance qui accorde l'exécution de cette sentence n'est susceptible d'aucun recours. Toutefois, le recours en annulation emporte en plein droit, dans les limites de la saisine de la cour, recours contre l'ordonnance du juge de l'exécution ou du dessaisissement de ce juge.

Article 1505 : Le recours en annulation prévu à l'article 1504 est porté devant la cour d'appel dans le ressort de laquelle la sentence a été rendue. Ce recours est recevable dès le prononcé de la sentence ; il cesse de l'être s'il n'a pas été exercé dans le mois de la signification de la sentence déclarée exécutoire.

Article 1506 : Le délai pour exercer les recours prévus aux articles 1501, 1502 et 1504 suspend l'exécution de la sentence arbitrale. Le recours exercé dans le délai est également suspensif.

Article 1507 : Les dispositions du titre IV du présent livre, à l'exception de celles de l'alinéa I de l'article 1487 et de l'article 1490, ne sont pas applicables aux voies de recours.

- *Les principes directeurs du procès*

Article 4 : L'objet du litige est déterminé par les prétentions respectives des parties. Ces prétentions sont fixées par l'acte introductif d'instance et par les conclusions en défense. Toutefois l'objet

du litige peut être modifié par des demandes incidentes lorsque celles-ci se rattachent aux prétentions originaires par un lien suffisant.

Article 5 : Le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé.

Article 6 : A l'appui de leurs prétentions, les parties ont la charge d'alléguer les faits propres à les fonder.

Article 7 : Le juge ne peut fonder sa décision sur des faits qui ne sont pas dans le débat. Parmi les éléments du débat, le juge peut prendre en considération même les faits que les parties n'auraient pas spécialement invoqués au soutien de leur prétentions.

Article 8 : Le juge peut inviter les parties à fournir les explications de fait qu'il estime nécessaires à la solution du litige.

Article 9 : Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention.

Article 10 : Le juge a le pouvoir d'ordonner d'office toutes les mesures d'instruction légalement admissibles.

Article 11 : Les parties sont tenues d'apporter leur concours aux mesures d'instruction sauf au juge à tirer toute conséquence d'une abstention ou d'un refus.

Article 12 : Le juge tranche le litige conformément aux règles de droit qui lui sont applicables. Il doit donner ou restituer leur exacte qualification aux faits et actes litigieux sans s'arrêter à la dénomination que les parties en auraient proposée. Il peut relever d'office les moyens de pur droit quel que soit le fondement juridique invoqué par les parties. Toutefois, il ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d'un accord

exprès et pour les droits dont elles ont la libre disposition, l'ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat. Le litige né, les parties peuvent aussi, dans les mêmes matières et sous la même condition, conférer au juge mission de statuer comme amiable compositeur, sous réserve d'appel si elles n'y ont pas spécialement renoncé.

Article 13 : Le juge peut inviter les parties à fournir les explications de droit qu'il estime nécessaires à la solution du litige.

Article 14 : Nulle partie ne peut être jugée sans avoir été entendue ou appelée.

Article 15 : Les parties doivent se faire connaître mutuellement en temps utile les moyens de fait sur lesquels elles fondent leurs prétentions, les éléments de preuve qu'elles produisent et les moyens de droit qu'elles invoquent, afin que chacune soit à même d'organiser sa défense.

Article 16 : Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction. Il ne peut retenir, dans sa décision, les moyens, les explications et les documents invoqués ou produits par les parties que si celles-ci ont été à même d'en débattre contradictoirement. Il ne peut fonder sa décision sur les moyens de droit qu'il a relevé d'office sans avoir au préalable invité les parties à présenter leurs observations.

Article 17 : Lorsque la loi permet ou la nécessité commande qu'une mesure soit ordonnée à l'insu d'une partie, celle-ci dispose d'un recours approprié contre la décision qui lui fait grief.

Article 18 : Les parties peuvent se défendre elles-mêmes, sous réserve des cas dans lesquels la représentation est obligatoire.

Article 19 : Les parties choisissent librement leur défenseur soit pour se faire représenter soit pour se faire assister suivant ce que la loi permet ou ordonne.

Article 20 : Le juge peut toujours entendre les parties elles-mêmes.

Article 21 : Il entre dans la mission du juge de concilier les parties.

- *La compétence territoriale*

Article 42 : La juridiction territorialement compétente est, sauf disposition contraire, celle du lieu où demeure le défendeur. S'il y a plusieurs défendeurs, le demandeur saisit, à son choix, la juridiction du lieu où demeure l'un d'eux. Si le défendeur n'a ni domicile ni résidence connus, le demandeur peut saisir la juridiction du lieu où il demeure ou celle de son choix s'il demeure à l'étranger.

Article 46 : Le demandeur peut saisir à son choix, outre la juridiction du lieu où demeure le défendeur : en matière contractuelle, la juridiction du lieu de la livraison effective de la chose ou du lieu de l'exécution de la prestation de service; en matière délictuelle, la juridiction du lieu du fait dommageable ou celle dans le ressort de laquelle le dommage a été subi; en matière mixte, la juridiction du lieu où est situé l'immeuble; en matière d'aliments ou de contribution aux charges du mariage, la juridiction du lieu où demeure le créancier.

- *La demande en justice*

Article 56 : L'assignation contient à peine de nullité, outre les mentions prescrites pour les actes d'huissier de justice : l'indication de la juridiction devant laquelle la demande est portée; l'objet de la demande avec un exposé des moyens; l'indication que, faute pour le défendeur de comparaître, il s'expose à ce qu'un jugement soit rendu contre lui sur les seuls éléments fournis par son adversaire. Le cas échéant, les mentions relatives à la

désignation des immeubles exigées pour la publication au fichier immobilier. Elle comprend aussi l'indication des pièces sur lesquelles la demande est fondée. Elle vaut conclusions.

Article 57 : La requête conjointe est l'acte commun par lequel les parties soumettent au juge leurs prétentions respectives, les points sur lesquels elles sont en désaccord ainsi que leurs moyens respectifs.

Elle contient, en outre, à peine d'irrecevabilité : 1. Pour les personnes physiques, les nom, prénoms, profession, domicile, nationalité, date et lieu de naissance de chacun des requérants ; Pour les personnes morales, leur forme, leur dénomination, leur siège social et l'organe qui les représente légalement; 2. L'indication de la juridiction devant laquelle la demande est portée; 3. Le cas échéant, les mentions relatives à la désignation des immeubles exigées pour la publication au fichier immobilier. Elle comprend aussi l'indication des pièces sur lesquelles la demande est fondée. Elle est datée et signée par les parties. Elle vaut conclusions.

Article 63 : Les demandes incidentes sont : la demande reconventionnelle, la demande additionnelle et l'intervention.

- *La communication des pièces entre les parties*

Article 132 : La partie qui fait état d'une pièce s'oblige à la communiquer à toute autre partie à l'instance. La communication des pièces doit être spontanée. En cause d'appel, une nouvelle communication des pièces déjà versées aux débats de première instance n'est pas exigée. Toute partie peut néanmoins la demander.

Article 133 : Si la communication des pièces, n'est pas faite, il peut être demandé, sans forme, au juge d'enjoindre cette communication.

- *L'obtention des pièces détenues par les parties*

Article 138 : Si, dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing signé privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce.

Article 139 : La demande est faite sans forme. Le juge, s'il estime cette demande fondée, ordonne la délivrance ou la production de l'acte de la pièce, en original, en copie ou en extrait selon le cas, dans les conditions et sous les garanties qu'il fixe, au besoin à peine d'astreinte.

Article 140 : La décision du juge est exécutoire à titre provisoire, sur minute s'il y a lieu.

Article 141 : En cas de difficulté, ou s'il est invoqué quelque empêchement légitime, le juge qui a ordonné la délivrance ou la production peut, sur la demande sans forme qui lui serait faite, rétracter ou modifier sa décision. Le tiers peut interjeter appel de la nouvelle décision dans les 15 jours de son prononcé.

Article 142 : Les demandes de production des éléments de preuve détenus par les parties sont faites, et leur production a lieu, conformément aux dispositions des articles 138 et 139.

- *Les mesures d'instruction*

Article 145 : S'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction légalement admissibles peuvent être ordonnées à la demande de tout intéressé, sur requête ou en référé.

Article 146 : Une mesure d'instruction ne peut être ordonnée sur un fait qui si la

partie qui allègue ne dispose pas d'éléments suffisants pour le prouver. En aucun cas une mesure d'instruction ne peut être ordonnée en vue de suppléer la carence de la partie dans l'administration de la preuve.

- *L'enquête*

Article 208 : Le juge entend les témoins en leur déposition séparément et dans l'ordre qu'il détermine.

Les témoins sont entendus en présence des parties ou celles-ci appelées. Par exception, le juge peut, si les circonstances l'exigent, inviter une partie à se retirer sous réserve du droit pour celle-ci d'avoir immédiatement connaissance des déclarations des témoins entendus hors sa présence. Le juge peut, s'il y a risque de déperissement de la preuve, procéder sans délai à l'audition d'un témoin après avoir, si possible, appelé les parties.

- *Mesures d'instruction exécutées par un technicien*

Article 232 : Le juge peut commettre toute personne de son choix pour l'éclairer par des constatations, par une consultation ou par une expertise sur une question de fait qui requiert les lumières d'un technicien.

Article 233 : Le technicien, investi de ses pouvoirs par le juge en raison de sa qualification, doit remplir personnellement la mission qui lui est confiée. Si le technicien désigné est une personne morale, son représentant legal soumet à l'agrément du juge le nom de la ou des personnes physiques qui assureront, au sein de celle-ci et en son nom l'exécution de la mesure.

Article 234 : Les techniciens peuvent être récusés pour les mêmes causes que les juges. S'il s'agit d'une personne morale, la récusation peut viser tant la personne morale elle-même que la ou les personnes physiques agréées par le juge. La partie qui entend récuser le technicien doit le faire devant le juge qui l'a commis ou

devant le juge chargé du contrôle avant le début des opérations ou dès la révélation de la cause de récusation. Si le technicien s'estime récusable, il doit immédiatement le déclarer au juge qui l'a commis ou au juge chargé du contrôle.

Article 235 : Si la récusation est admise, si le technicien refuse la mission ou s'il existe un empêchement légitime, il est pourvu au remplacement du technicien par le juge qui l'a commis ou par le juge chargé du contrôle. Le juge peut également, à la demande des parties ou d'office, remplacer le technicien qui manquerait à ses devoirs, après avoir provoqué ses explications.

Article 236 : Le juge qui a commis le technicien ou le juge chargé du contrôle peut accroître ou restreindre la mission confiée au technicien.

Article 237 : Le technicien commis doit accomplir sa mission avec conscience, objectivité et impartialité.

Article 238 : Le technicien doit donner son avis sur les points pour l'examen desquels il a été commis.

Il ne peut répondre à d'autres questions, sauf accord écrit des parties. Il ne doit jamais porter d'appréciations d'ordre juridique.

Article 239 : Le technicien doit respecter les délais qui lui sont impartis.

Article 240 : Le juge ne peut donner au technicien mission de concilier les parties.

Article 241 : Le juge chargé du contrôle peut assister aux opérations du technicien. Il peut provoquer ses explications et lui impartir des délais.

Article 242 : Le technicien peut recueillir des informations orales ou écrites de toutes personnes, sauf à ce que soient précisés leur nom, prénoms, demeure et profession ainsi que, s'il y a lieu, leur lien

de parenté ou d'alliance avec les parties, de subordination à leur égard, de collaboration ou de communauté d'intérêts avec elles. Lorsque le technicien commis ou les parties demandent que ces personnes soient entendues par le juge, celui-ci procède à leur audition s'il l'estime utile.

Article 243 : Le technicien peut demander communication de tous documents aux parties et aux tiers, sauf au juge à l'ordonner en cas de difficulté.

Article 244 : Le technicien doit faire connaître dans son avis toutes les informations qui apportent un éclaircissement sur les questions à examiner. Il lui est interdit de révéler les autres informations dont il pourrait avoir connaissance à l'occasion de l'exécution de sa mission. Il ne peut faire état que des informations légitimement recueillies.

Article 245 : Le juge peut toujours inviter le technicien à compléter ou expliquer, soit par écrit, soit à l'audience, ses consultations ou ses conclusions. Le technicien peut à tout moment demander au juge de l'entendre. Le juge ne peut, sans avoir préalablement recueilli les observations du technicien commis, étendre la mission de celui-ci ou confier une mission complémentaire à un autre technicien.

Article 246 : Le juge n'est pas lié par les constatations ou les conclusions du technicien.

• *L'expertise*

Article 263 : L'expertise n'a lieu d'être ordonnée que dans les cas où les constatations ou une consultation ne pourraient suffire à éclairer le juge.

Article 264 : Il est désigné qu'une seule personne à titre d'expert à moins que le juge n'estime nécessaire d'en nommer plusieurs.

Article 265 : La décision qui ordonne l'expertise : expose les circonstances qui rendent nécessaire l'expertise et, s'il y a lieu, la nomination de plusieurs experts; nomme l'expert ou les experts; énonce les chefs de la mission de l'expert; impartit le délai dans lequel l'expert devra donner son avis.

Article 266 : La décision peut aussi fixer une date à laquelle l'expert et les parties se présenteront devant le juge qui l'a rendue ou devant le juge chargé du contrôle pour que soient précisés la mission et, s'il y a lieu, le calendrier des opérations. Les documents utiles à l'expertise sont remis à l'expert lors de cette conférence.

Article 267 : Dès le prononcé de la décision nommant l'expert, le secrétaire de la juridiction lui en notifie copie par lettre simple. L'expert fait connaître sans délai au juge son acceptation; il doit commencer les opérations d'expertise dès qu'il est averti que les parties ont consigné la provision mise à leur charge, ou le montant de la première échéance dont la consignation a pu être assortie, à moins que le juge ne lui enjoigne d'entreprendre immédiatement ses opérations.

Article 268 : Les dossiers des parties ou les documents nécessaires à l'expertise sont provisoirement conservés au secrétariat de la juridiction sous réserve de l'autorisation donnée par le juge aux parties qui les ont remis d'en retirer certains éléments ou de s'en faire délivrer copie. L'expert peut les consulter même avant d'accepter sa mission. Dès son acceptation, l'expert peut, contre émargement ou récépissé, retirer ou se faire adresser par le secrétaire de la juridiction les dossiers ou les documents des parties.

Article 269 : Le juge qui ordonne l'expertise ou le juge chargé du contrôle fixe, lors de la nomination de l'expert ou dès qu'il est en mesure de le faire, le montant d'une provision à valoir sur la

remunération de l'expert aussi proche que possible de sa rémunération définitive prévisible. Il désigne la ou les parties qui devront consigner la provision au greffe de la juridiction dans le délai qu'il détermine ; si plusieurs parties sont désignées, il indique dans quelle proportion chacune des parties devra consigner. Il aménage, s'il y a lieu, les échéances dont la consignation peut être assortie.

Article 270 : Le greffier invite les parties qui en ont la charge, en leur rappelant les dispositions de l'article 271, à consigner la provision au greffe dans le délai et selon les modalités impartis. Il informe l'expert de la consignation.

Article 271 : A défaut de consignation dans le délai et selon les modalités impartis, la désignation de l'expert est caduque à moins que le juge, à la demande d'une des parties se prévalant d'un motif légitime, ne décide une prorogation du délai ou un relevé de la caducité. L'instance est poursuivie sauf à ce qu'il soit tiré toute conséquence de l'abstention ou du refus de consigner.

Article 272 : La décision ordonnant l'expertise peut être frappée d'appel indépendamment du jugement sur le fond sur autorisation du premier président de la cour d'appel s'il est justifié d'un motif grave et légitime. La partie qui veut faire appel saisit le premier président qui statue en la forme des référés. L'assignation doit être délivrée dans le mois de la décision. S'il fait droit à la demande, le premier président fixe le jour où l'affaire sera examinée par la cour, laquelle est saisie et statue comme en matière de procédure à jour fixe ou comme il est dit à l'article 948 selon le cas. Si le jugement ordonnant l'expertise s'est également prononcé sur la compétence, la cour peut être saisie de la contestation sur la compétence alors même que les parties n'auraient pas formé contredit.

Article 273 : L'expert doit informer le juge de l'avancement de ses opérations.

Article 274 : Lorsque le juge assiste aux opérations d'expertise, il peut consigner dans un procès-verbal ses constatations, les explications de l'expert ainsi que les déclarations des parties et des tiers; le procès-verbal est signé par le juge.

Article 275 : Les parties doivent remettre sans délai à l'expert tous les documents que celui-ci estime nécessaires à l'accomplissement de sa mission. En cas de carence des parties, l'expert en informe le juge qui peut ordonner la production des documents, s'il y a lieu sous astreinte, ou bien, le cas échéant, l'autoriser à passer outre ou à déposer son rapport en l'état.

Article 276 : L'expert doit prendre en considération les observations ou réclamations des parties, et, lorsqu'elles sont écrites, les joindre à son avis si les parties le demandent. Il doit faire mention, dans son avis, de la suite qu'il leur aura donnée.

Article 277 : Lorsque le ministère public est présent aux opérations d'expertise, ses observations sont, à sa demande, relatées dans l'avis de l'expert, ainsi que la suite que celui-ci aura donnée.

Article 278 : L'expert peut prendre l'initiative de recueillir l'avis d'un autre technicien, ainsi seulement dans une spécialité distincte de la sienne.

Article 279 : Si l'expert se heurte à des difficultés qui font obstacles à l'accomplissement de sa mission ou si une extension de celle-ci s'avère nécessaire, il en fait rapport au juge. Celui-ci peut, en se prononçant, proroger le délai dans lequel l'expert doit donner son avis.

Article 280 : L'expert qui justifie avoir fait des avances peut être autorisé à prélever un acompte sur la somme consignée. Si l'expert établit que la provision allouée

devient insuffisante, le juge ordonne la consignation d'une provision complémentaire. A défaut de consignation dans le délai et selon les modalités fixés par le juge, et sauf prorogation de ce délai l'expert dépose son rapport en l'état.

Article 281 : Si les parties viennent à se concilier, l'expert constate que sa mission est devenue sans objet ; il en fait rapport au juge. Les parties peuvent demander au juge de donner force exécutoire à l'acte exprimant leur accord.

Article 282 : Si l'avis n'exige pas de développements écrits, le juge peut autoriser l'expert à l'exposer oralement ; il en est dressé procès-verbal. La rédaction du procès-verbal peut toutefois être suppléée par une mention dans le jugement si l'affaire est immédiatement jugée en dernier ressort. Dans les autres cas, l'expert doit déposer un rapport au secrétariat de la juridiction. Il est rédigé qu'un seul rapport, même s'il y a plusieurs experts; en cas de divergence, chacun indique son opinion. Si l'expert a recueilli l'avis d'un autre technicien dans une spécialité distincte de la sienne, cet avis est joint, selon le cas, au rapport au procès-verbal ou au dossier.

Article 283 : Si le juge ne trouve pas dans le rapport les éclaircissements suffisants, il peut entendre l'expert, les parties présentes ou appelées.

Article 284 : Dès le dépôt du rapport, le juge fixe la rémunération de l'expert et l'autorise à se faire remettre, jusqu'à due concurrence, les sommes consignées au greffe. Il ordonne, s'il y a lieu, le versement des sommes complémentaires dues à l'expert en indiquant la ou les parties qui en ont la charge, ou la restitution des sommes consignées en excédent. Le juge délivre à l'expert, sur sa demande, un titre exécutoire.

Article 284-1 : Si l'expert le demande, une copie du jugement rendu au vu de son avis lui est adressée ou remise par le greffier.

- *La vérification d'écriture*

Article 287 : Si l'une des parties dénie l'écriture qui lui est attribuée ou déclare ne pas reconnaître celle qui est attribuée à son auteur, le juge vérifie l'écrit contesté à moins qu'il ne puisse statuer sans en tenir compte. Si l'écrit contesté n'est relatif qu'à certains chefs de la demande, il peut être statué sur les autres.

Article 288 : Il appartient au juge de procéder à la vérification d'écriture au vu des éléments dont il dispose après avoir, s'il y a lieu, enjoint aux parties de produire tous documents à lui comparer et fait composer, sous sa dictée, des échantillons d'écriture.

Article 289 : S'il ne statue pas sur le champ, le juge retient l'écrit à vérifier et les pièces de comparaison ou ordonne leur dépôt au secrétariat de la juridiction.

Article 290 : Lorsqu'il est utile de comparer l'écrit contesté à des documents détenus par des tiers, le juge peut ordonner, même d'office et à peine d'astreinte, que ces documents soient déposés au secrétariat de la juridiction en original ou en reproduction. Il prescrit toutes les mesures nécessaires, notamment celles qui sont relatives à la conservation, la consultation, la reproduction, la restitution ou le retablissement des documents.

Article 291 : En cas de nécessité, le juge ordonne la comparution personnelle des parties, le cas échéant en présence d'un consultant, ou toute autre mesure d'instruction. Il peut entendre l'auteur prétendu de l'écrit contesté.

Article 292 : S'il fait appel à un technicien, celui-ci peut être autorisé par le juge à retirer contre émargement l'écrit contesté et les pièces de comparaison ou à

se les faire adresser par le secrétaire de la juridiction.

Article 293 : Peuvent être entendus comme témoins ceux qui ont vu écrire ou signer l'écrit contesté ou dont l'audition paraît utile à la manifestation de la vérité.

Article 294 : Le juge règle les difficultés d'exécution de la vérification d'écriture notamment quand à la détermination des pièces de comparaison. Sa décision revêt la forme soit d'une simple mention au dossier ou au registre d'audience, soit, en cas de nécessité, d'une ordonnance ou d'un jugement.

- *La récusation*

Article 341 : La récusation d'un juge n'est admise que pour les causes déterminées par la loi.

Comme il est dit à l'article L.731-1 du Code de l'organisation judiciaire sauf dispositions particulières à certaines juridictions la récusation d'un juge peut être demandée : 1. Si lui même ou son conjoint à un intérêt personnel à la contestation ; 2. Si lui même ou son conjoint est créancier, débiteur, héritier présomptif ou donataire de l'une des parties; 3. Si lui même ou son conjoint est parent ou allié de l'une des parties ou de son conjoint jusqu'au quatrième degré inclusivement; 4. S'il y a eu ou s'il y a procès entre lui ou son conjoint et l'une des parties ou son conjoint; 5. S'il a précédemment connu de l'affaire comme juge ou comme arbitre ou s'il a conseillé l'une des parties; 6. Si le juge ou son conjoint est chargé d'administrer les biens de l'une des parties; 7. S'il existe un lien de subordination entre le juge ou son conjoint et l'une des parties ou son conjoint; 8. S'il y a amitié ou intimité notoire entre le juge et l'une des parties; Le ministère public, partie jointe, peut être recusé dans les mêmes cas.

Article 344 : La demande de récusation est formée par acte remis au secrétariat de la juridiction à laquelle appartient le juge

ou par une déclaration qui est consignée par le secrétaire dans un procès verbal. La demande doit, à peine d'irrecevabilité, indiquer avec précision les motifs de la récusation et être accompagnée des pièces propres à la justifier. Il est délivré un récépissé de la demande.

Article 345 : Le secrétaire communique au juge la copie de la demande de récusation dont celui-ci est l'objet.

Article 346 : Le juge, dès qu'il a communication de la demande, doit s'abstenir jusqu'à ce qu'il ait été statué sur sa récusation. En cas d'urgence, un autre juge peut être désigné, même d'office, pour procéder aux opérations nécessaires.

Article 347 : Dans les huit jours de cette communication, le juge récusé fait connaître par écrit soit son acquiescement à la récusation, soit les motifs pour lesquels il s'y oppose.

Article 348 : Si le juge acquiesce, il est aussitôt remplacé.

Article 349 : Si le juge s'oppose à la récusation ou ne répond pas, la demande de récusation est jugée sans délai par la cour d'appel ou, si elle est dirigée contre un assesseur d'une juridiction échevinale, par le président de cette juridiction qui se prononce sans appel.

Article 350 : Le secrétaire communique la demande de récusation avec la réponse du juge ou mention de son silence, selon le cas au premier président de la cour d'appel ou au président de la juridiction échevinale.

Article 351 : L'affaire est examinée sans qu'il soit nécessaire d'appeler les parties ni le juge récusé. Copie de la décision est remise ou adressée par le secrétaire au juge et aux parties.

Article 352 : Si la récusation est admise il est procédé au remplacement du juge.

Article 353 : Si la récusation est rejetée, son auteur peut être condamné à une amende civile de 100 à 10 000F sans préjudice des dommages et intérêts qui pourraient être réclamés.

Article 354 : Les actes accomplis par le juge récusé avant qu'il ait eu connaissance de la demande de récusation ne peuvent être remis en question.

Article 355 : La récusation contre plusieurs juges doit, à peine d'irrecevabilité, être demandée par un même acte à moins qu'une cause de récusation ne se révèle postérieurement. Il est alors procédé comme il est dit au chapitre ci-après, alors même que le renvoi n'aurait pas été demandé.

- *Le délibéré*

Article 448 : Les délibérations des juges sont secrètes.

- *Le jugement*

Article 461 : Il appartient à tout juge d'interpréter sa décision si elle n'est pas frappée d'appel. La demande en interprétation est formée par simple requête de l'une des parties ou par requête commune. Le juge se prononce les parties entendues ou appelées.

Article 462 : Les erreurs et omissions matérielles qui affectent un jugement, même passé en force de chose jugée, peuvent toujours être réparées par la juridiction qui l'a rendue ou par celle à laquelle il est déféré, selon ce que le dossier révèle ou, à défaut, ce que la raison commande. Le juge est saisi par simple requête de l'une des parties ou par requête commune ; il peut aussi se saisir d'office. Le juge statue après avoir entendu les parties ou celles-ci appelées. La décision rectificative est mentionnée sur la minute et sur les expéditions du jugement. Elle est notifiée comme le jugement. Si la décision rectifiée est passée en force de chose jugée, la décision

rectificative ne peut être attaquée que par voie du recours en cassation.

- *La tierce opposition*

Article 588 : La tierce opposition incidente à une contestation dont est saisie une juridiction est tranchée par cette dernière si elle est de degré supérieur à celle qui a rendu le jugement ou si, étant d'égal degré, aucune règle de compétence d'ordre public n'y fait obstacle. La tierce opposition est alors formée de la même manière que les demandes incidentes.

- *La charge des dépens*

Article 695 : Les dépens afférents aux instances, actes et procédures d'exécution comprennent : 1. Les droits, taxes, redevances ou émoluments perçus par les secrétariats des juridictions ou l'administration des impôts à l'exception des droits, taxes et pénalités éventuellement dus sur les actes et titres produits à l'appui des prétentions des parties; 2. Les indemnités des témoins; 3. La rémunération des techniciens; 4. Les débours tarifés; 5. Les émoluments des officiers publics ou ministériels; 7. La rémunération des avocats dans la mesure ou elle est réglementée y compris les droits de plaidoirie.

Article 696 : La partie perdante est condamnée aux dépens, à moins que le juge, par décision motivée, n'en mette la totalité ou une fraction à la charge d'une autre partie.

- *Saisine du tribunal*

Article 757 : Le tribunal est saisi, à la diligence de l'une ou l'autre des parties, par la remise au secrétariat-greffe d'une copie de l'assignation. Cette remise doit être faite dans les quatre mois de l'assignation, faute de quoi celle-ci sera caduque. La caducité est constatée d'office par ordonnance du président ou du juge saisi de l'affaire. A défaut de remise, requête peut être présentée au président en vue de faire constater la caducité.

- *Instruction devant le juge de la mise en état*

Article 763 : L'affaire est instruite sous le contrôle d'un magistrat de la chambre à laquelle elle a été distribuée. Celui-ci a mission de veiller au déroulement loyal de la procédure, spécialement à la ponctualité de l'échange des conclusions et de la communication des pièces.

Article 764 : Le juge de la mise en état fixe, au fur et à mesure, les délais nécessaires à l'instruction de l'affaire, eu égard à la nature, à l'urgence et à la complexité de celle-ci, et après avoir provoqué l'avis des avocats. Il peut accorder des prorogations de délai. Il peut également renvoyer l'affaire à une conférence ultérieure en vue de faciliter le règlement du litige.

Article 765 : Le juge de la mise en état peut inviter les avocats à répondre aux moyens sur lesquels ils n'auraient pas conclu. Il peut également les inviter à fournir les explications de fait et de droit nécessaires à la solution du litige. Il peut se faire communiquer l'original des pièces versées aux débats ou en demander la remise en copie.

Article 766 : Le juge de la mise en état procède aux jonctions et disjonctions d'instance.

Article 767 : Le juge de la mise en état peut, même d'office, entendre les parties. L'audition des parties à lieu contradictoirement à moins que l'une d'elles, dûment convoquée, ne se présente pas.

Article 768 : Le juge de la mise en état peut constater la conciliation, même partielle, des parties.

Article 768-1 : Le juge de la mise en état peut inviter les parties à mettre en cause tous les intéressés dont la présence lui paraît nécessaire à la solution du litige.

Article 769 : Le juge de la mise en état constate l'extinction de l'instance.

Article 770 : Le juge de la mise en état exerce tous les pouvoirs nécessaires à la communication, à l'obtention et à la production des pièces.

Article 771 : Lorsque la demande est présentée postérieurement à sa désignation, le juge de la mise en état est, jusqu'à son dessaisissement, seul compétent, à l'exclusion de toute autre formation du tribunal pour : 1. Statuer sur les exceptions dilatoires et sur les nullités pour vice de forme; 2. Allouer une provision pour le procès; 3. Accorder une provision au créancier lorsque l'existence de l'obligation n'est pas sérieusement contestable. Le juge de la mise en état peut subordonner l'exécution de sa décision à la constitution d'une garantie dans les conditions prévues aux articles 517 à 522; 4. Ordonner toutes les autres mesures provisoires, même conservatoires, à l'exception des saisies conservatoires et des hypothèques et nantissements provisoires ainsi que modifier ou compléter, en cas de survenance d'un fait nouveau, les mesures qui auraient déjà été ordonnées; 5. Ordonner, même d'office, toute mesure d'instruction.

Article 772 : Le juge de la mise en état peut statuer sur les dépens.

Article 773 : Les mesures prises par le juge de la mise en état sont l'objet d'une simple mention au dossier; avis en est donné aux avocats. Toutefois, dans les cas prévus aux articles 769 à 772, le juge de la mise en état statue sur ordonnance motivée sous réserve de règles particulières aux mesures d'instruction.

Article 774 : L'ordonnance est rendue, immédiatement s'il y a lieu, les avocats entendus ou appelés.

Les avocats sont convoqués par le juge à son audience. En cas d'urgence, une partie

peut, par notification entre avocats, inviter l'autre à se présenter devant le juge aux jour, heure et lieu fixés par celui-ci.

Article 775 : Les ordonnances du juge de la mise en état n'ont pas, au principal, l'autorité de la chose jugée.

Article 776 : Les ordonnances du juge de la mise en état ne sont pas susceptibles d'opposition. Elles ne peuvent être frappées d'appel ou de pourvoi en cassation qu'avec le jugement sur le fond. Toutefois, elles sont susceptibles d'appel dans les cas et conditions prévus en matière d'expertise ou de sursis à statuer. Elles le sont également, dans les quinze jours à compter de leur signification : 1. Lorsqu'elles ont pour effet de mettre fin à l'instance ou lorsqu'elles constatent son extinction; 2. Lorsqu'elles ont trait aux mesures provisoires ordonnées en matière de divorce ou de séparation de corps; 3. Lorsqu'elles, dans le cas où le montant de la demande est supérieur au taux de compétence en dernier ressort, elles ont trait aux provisions qui peuvent être accordées au créancier au cas où l'existence de l'obligation n'est pas sérieusement contestable.

Article 777 : Le juge de la mise en état contrôle l'exécution des mesures d'instruction qu'il ordonne.

Article 778 : Des l'exécution de la mesure d'instruction ordonnée, l'instance poursuit son cours à la diligence du juge de la mise en état.

Article 779 : Dès que l'état de l'instruction le permet, le juge de la mise en état renvoie l'affaire devant le tribunal pour être plaidée à la date fixée par le président ou par lui-même s'il a reçu délégation à cet effet. Le juge de la mise en état déclare l'instruction close. La date de la clôture doit être aussi proche que possible de celle fixée pour les plaidoiries. Le juge de la mise en état demeure saisi jusqu'à l'ouverture des débats.

Article 780 : Si l'un des avocats n'a pas accompli les actes de procédure dans le délai imparti, le renvoi devant le tribunal et la clôture de l'instruction peuvent être décidés par le juge, d'office ou à la demande d'une autre partie, sauf, en ce dernier cas, la possibilité pour le juge de refuser par ordonnance motivée non susceptible de recours.

Article 781 : Si les avocats s'abstiennent d'accomplir les actes de procédures dans les délais impartis, le juge de la mise en état peut, d'office, après avis donné aux avocats, prendre une ordonnance de radiation motivée non susceptible de recours. Copie de cette ordonnance est adressée à chacune des parties par lettre simple adressée à leur domicile réel ou leur résidence.

Article 782 : La clôture de l'instruction, dans les cas prévus aux articles 760, 761, 779 et 780, est prononcée par une ordonnance non motivée qui ne peut être frappée d'aucun recours. Copie de cette ordonnance est délivrée aux avocats.

Article 783 : Après l'ordonnance de clôture, aucune conclusion ne peut être déposée ni aucune pièce produite aux débats, à peine d'irrecevabilité prononcée d'office. Sont cependant recevables, les demandes en intervention volontaire, les conclusions relatives aux loyers, arrérages, intérêts et autres accessoires échus et aux débours faits jusqu'à l'ouverture des débats, si leur décompte ne peut faire l'objet d'aucune contestation sérieuse, ainsi que les demandes de révocation de l'ordonnance de clôture. Sont également recevables, les conclusions qui tendent à la reprise de l'instance en l'état ou celle-ci se trouvait au moment de son interruption.

Article 784 : L'ordonnance de clôture ne peut être révoquée que s'il se révèle une cause grave depuis qu'elle a été rendue; la constitution d'avocat postérieurement à la

clôture ne constitue pas, en soi, une cause de révocation. Si une demande en intervention volontaire est formée après la clôture de l'instruction, l'ordonnance de clôture n'est révoquée que si le tribunal ne peut immédiatement statuer sur le fond. L'ordonnance de clôture peut être révoquée, d'office ou à la demande des parties, soit par ordonnance motivée par le juge de la mise en état, soit après l'ouverture des débats, par décision du tribunal.

Article 785 : S'il estime que l'affaire le requiert, le président de la chambre peut charger le juge de la mise en état d'établir un rapport écrit; exceptionnellement, il peut en charger un autre magistrat ou l'établir lui-même. Le rapport expose l'objet de la demande et les moyens des parties, il précise les questions de fait et de droit soulevées par le litige et fait mention des éléments propres à éclairer le débat. Le magistrat chargé du rapport présente celui-ci à l'audience, avant les plaidoiries, sans faire connaître son avis.

Article 786 : Le juge de la mise en état ou le magistrat chargé du rapport peut, si les avocats ne s'y opposent pas, tenir seul l'audience pour entendre les plaidoiries. Il en rend compte au tribunal dans son délibéré.

Article 787 : Les mesures d'instruction ordonnées par le tribunal sont exécutées sous le contrôle du juge de la mise en état. Dès l'accomplissement d'une mesure d'instruction, le président de la chambre à laquelle l'affaire a été distribuée la renvoie à l'audience du tribunal ou au juge de la mise en état comme il est dit à la sous-section II ci-dessus.

- *Les ordonnances de référé*

Article 808 : Dans tous les cas d'urgence, le président du tribunal de grande instance peut ordonner en référé toutes les mesures qui ne se heurtent à aucune contestation sérieuse ou que justifie l'existence d'un différend.

Article 809 : Le président peut toujours même en présence d'une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour cesser un trouble manifestement illicite. Dans les cas où l'existence de l'obligation n'est pas sérieusement contestable, il peut accorder une provision au créancier, ou ordonner l'exécution de l'obligation même s'il s'agit d'une obligation de faire.

Article 872 : Dans tous les cas d'urgence, le président du tribunal de commerce peut, dans les limites de la compétence du tribunal, ordonner en référé toutes les mesures qui ne se heurtent à aucune contestation sérieuse ou que justifie l'existence d'un différend.

Article 873 : Le président peut, dans les mêmes limites et même en présence d'une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite. Dans les cas où l'existence de l'obligation n'est pas sérieusement contestable, il peut accorder une provision au créancier ou ordonner l'exécution d'une obligation même s'il s'agit d'une obligation de faire.

- *La procédure avec représentation obligatoire devant la Cour d'Appel*

Article 901 : La déclaration d'appel est faite par acte contenant, à peine de nullité : 1. Si l'appelant est une personne physique : ses nom, prénoms, domicile, nationalité, date et lieu de naissance; Si l'appelant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement. 2. Les nom, prénoms et domicile de l'intime ou, s'il s'agit d'une personne morale, sa dénomination et son siège social. 3. La constitution de l'avoué de l'appelant. 4. L'indication du jugement. 5. L'indication de la cour d'appel devant laquelle l'appel

est porté. La déclaration indique, le cas échéant, les chefs du jugement auxquels l'appel est limité et le nom de l'avocat chargé d'assister l'appelant devant la cour. Elle est signée par l'avoué.

Article 902 : La déclaration est remise au secrétariat-greffe de la cour en autant d'exemplaire qu'il y a d'intimés, plus deux. La remise est constatée par la mention de sa date et le visa du greffier sur chaque exemplaire dont l'un est immédiatement restitué.

Article 903 : Le greffier adresse aussitôt, par lettre simple, à chacun des intimés, un exemplaire de la déclaration avec l'indication de l'obligation de constituer avoué. Au cas où cet exemplaire lui serait renvoyé par l'administration des postes, le greffier le transmet aussitôt à l'avoué de l'appelant, lequel procède comme il est dit à l'article 908.

Article 904 : Dès qu'il est constitué, l'avoué de l'intimé en informe celui de l'appelant; copie de l'acte de constitution est remise au secrétariat-greffe.

Article 905 : La cour est saisie à la diligence de l'une ou l'autre partie par la remise au secrétariat-greffe d'une demande d'inscription au rôle. Cette demande doit être remise dans les deux mois de la déclaration, faute de quoi celle-ci sera caduque. La caducité est constatée d'office par ordonnance du premier président ou du président de la chambre à laquelle l'affaire a été distribuée. À défaut de remise, requête peut être présentée au premier président en vue de constater la caducité.

Article 906 : Une copie de la déclaration d'appel visée par le greffier et une expédition du jugement ou une copie certifiée conforme par l'avoué sont jointes à la demande d'inscription au rôle.

Article 907 : Le premier président désigne la chambre à laquelle l'affaire est

distribuée. Avis en est donné par le secrétariat-greffe aux avoués constitués.

Article 908 : Lorsqu'une partie, sur la lettre adressée par le secrétariat-greffe, n'a pas constitué avoué, l'appelant l'assigné en lui signifiant la déclaration d'appel. L'assignation indique, à peine de nullité, que faute pour le défendeur de constituer avoué dans le délai de quinze jours, il s'expose à ce qu'un arrêt soit rendu contre lui sur les seuls éléments fournis par son adversaire.

Article 909 : Les conclusions sont notifiées et les pièces communiquées par l'avoué de chacune des parties à celui de l'autre partie; en cas de pluralité de demandeurs ou de défendeurs, elles doivent l'être à tous les avoués constitués. Copie des conclusions est remise au secrétariat-greffe avec la justification de leur notification.

Article 910 : L'affaire est instruite sous le contrôle d'un magistrat de la chambre à laquelle elle est distribuée, dans les conditions prévues par les articles 763 à 787 et par les dispositions qui suivent. Lorsque l'affaire semble présenter un caractère d'urgence ou pouvoir être jugée à bref délai, le président de la chambre à laquelle elle est distribuée fixe le jour et l'heure auxquels elle sera appelée; au jour indiqué, il est procédé selon les modalités prévues aux articles 760 à 762.

Article 911 : Le conseiller de la mise en état est compétent pour déclarer l'appel irrecevable et trancher à cette occasion toute question ayant trait à la recevabilité de l'appel.

Article 912 : Le conseiller de la mise en état, lorsqu'il est saisi, est seul compétent pour suspendre l'exécution des jugements improprement qualifiés en dernier ressort, ou exercer les pouvoirs qui lui sont conférés en matière d'exécution provisoire.

Article 913 : Les avoués ont seuls qualité pour représenter les parties et conclure en leur nom. Les avis ou injonctions sont valablement adressés aux seuls avoués. Les avocats sont entendus sur leur demande.

Article 914 : Les ordonnances du conseiller de la mise en état ne sont susceptibles d'aucun recours indépendamment de l'arrêt sur le fond. Toutefois, elles peuvent être déférées par simple requête à la cour dans les quinze jours de leur date lorsqu'elles ont pour effet de mettre fin à l'instance, lorsqu'elles constatent son extinction ou lorsqu'elles ont trait à des mesures provisoires en matière de divorce ou de séparation de corps.

Code Civil

Article 1592 : Il peut cependant être laissé à l'arbitrage d'un tiers ; si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente.

Article 2061 : La clause compromissoire est nulle s'il n'est disposé autrement par la loi.

Divers Textes

- Edit de 1790 : Loi du 16-24 Aout 1790

Article 1 : l'arbitrage est le moyen le plus raisonnable pour terminer les contestations entre les citoyens.

- Consitution de 1958

Article 5 : Le président de la République veille au respect de la Constitution. Il assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'Etat. Il est le garant de l'indépendance nationale, de l'intégrité du territoire, du respect des accords de Communautés et des traités.

- Loi numéro 73-6 du 3 Janvier 1973 'Instituant un médiateur' (dans JO du 4 Janvier 1973 p164)

Article 1 : Le médiateur reçoit les réclamations concernant dans leur relation avec les administrés, le fonctionnement des administrations de l'Etat, des collectivités publiques territoriales, des établissements publics et de tout autre organisme investi d'une mission de service public.

- Décret numéro 78-381 du 20 Mars 1978 'Relatif aux conciliateurs' (dans JO du 23 Mars 1978 p1265)

Article 1 : Il est institué des conciliateurs qui ont pour mission de faciliter, en dehors de toute procédure judiciaire, le règlement amiable des différends portant sur des droits dont les intéressés ont la libre disposition. Les fonctions des conciliateurs sont exercées à titre bénévole.

- Loi numéro 84-148 du 1er Mars 1984 'Relative à la prévention et au règlement amiable des difficultés des entreprises' (dans JO du 2 Mars 1984 p751)

Article 35.3 : Le conciliateur a pour mission de favoriser le redressement notamment par la conclusion d'un accord entre le débiteur et les principaux créanciers de celui-ci sur les délais de paiement ou des remises de dettes'.

- Décret numéro 85-95 du 22 Janvier 1985 'Modifiant le Code du travail pris pour l'application du Titre II et du Titre III du Livre V du Code du travail et relatif aux procédures de règlement des conflits collectifs du travail' (dans JO du 25 Janvier 1985 p1053)
- Loi numéro 91-650 du 9 Juillet 1991 : 'Portant réforme des procédures civiles d'exécution' (dans JO du 14 Juillet 1991 p9228)

Article 67 : Toute personne dont la créance paraît fondée en son principe peut solliciter du juge l'autorisation de pratiquer une mesure conservatoire sur les biens de son débiteur, sans commandement préalable, si elle justifie

de circonstances susceptibles d'en menacer le recouvrement. La mesure conservatoire prend la forme d'une saisie conservatoire ou d'une surêté judiciaire.

- Décret numéro 92-755 du 31 Juillet 1992 'Instituant de nouvelles règles relatives aux procédures civiles d'exécution pour l'application de la loi numéro 91-650 du 9 Juillet 1991 portant sur la réforme des procédures civiles d'exécution' (dans JO du 5 Août 1992 p10530).
- Loi numéro 95-125 du 22 Janvier 1995 'Relative à l'organisation des juridictions et à la procédure civile, pénale et administrative' (dans JO du 9 Février 1995 p2175)

Article 21 : Le juge peut, après avoir obtenu l'accord des parties, désigner une tierce personne remplissant les conditions fixées par le décret en Conseil d'Etat pour procéder : 1./ Soit aux tentatives préalables de conciliation prescrites par la loi, sauf en matière de divorce et de séparation de corps. 2./ Soit à une médiation, en état de la procédure et y compris en référé, pour tenter de parvenir à un accord entre les parties. Le juge fixe le montant de la provision à valoir sur la rémunération du médiateur et désigne la ou les parties qui consigneront la provision dans le délai qu'il détermine. La désignation du médiateur est caduque à défaut de consignation dans le délai et selon les modalités impartis. L'instance est alors poursuivie.

Article 22 : Les parties déterminent librement la répartition entre elles de la charge des frais de la médiation. A défaut d'accord, ces frais sont répartis à parts égales, à moins que le juge n'estime qu'une telle répartition est inéquitable au regard de la situation économique des parties.

Article 23 : La durée de la mission de la conciliation et de la médiation est initialement fixée par le juge sans qu'elle

puisse excéder un délai fixé par le Conseil D'Etat. Le juge peut toutefois renouveler la mission de conciliation ou de médiation. Il peut également y mettre fin avant l'expiration du délai qu'il a fixé, d'office ou à la demande du conciliateur, du médiateur ou d'une partie.

Article 24 : Le conciliateur et le médiateur sont tenus à l'obligation du secret à l'égard des tiers. Les constatations du conciliateur et du médiateur et les déclarations qu'ils recueillent ne peuvent être évoquées devant le juge saisi du litige qu'avec l'accord des parties. Elles ne peuvent être utilisées dans une autre instance. Toutefois le conciliateur et le médiateur informe le juge de ce que les parties sont ou non parvenues à un accord.

Article 25 : En cas d'accord, les parties peuvent soumettre celui-ci à l'homologation du juge qui lui donne force exécutoire.

Article 26 : Les dispositions du présent chapitre ne sont pas applicables aux procédures pénales. Un décret en Conseil d'Etat précise les conditions d'application de ces dispositions et détermine les règles applicables à la provision à valoir sur la rémunération de la personne chargée de procéder à la médiation.

- Décret d'application 1996 numéro 96-652 du 22 Juillet 1996 'Relatifs à la conciliation et à la médiation judiciaires' (dans JO du 23 Juillet 1996 p11125)

Appendix 5 : List of cases

- *Adams v Great North of Scotland Railway Co* (1889) 16 R 843
- *Adda et autres v Société CHM2 et autres*, Appeal Court of Paris, 14th chambre, 20th February 1984 in Rev. Arb.1986.236
- *Aita c/ Ojeh*, Appeal Court of Paris, 18th February 1986 in D.1987.339
- *Amco Asia Corporation and others v Republic of Indonesia* in ILM.1985.365
- *Anderson v Aberdeen Railway* (1850) 12 D 781
- *Anderson v Gibb* (OH) 1993 SLT 726
- *Anton Piller KG v Manufacturing Process* [1976] 1 ALL ER 779
- *Arenson v Arenson* (H.L) [1977] AC 405
- *Association ESCP v GIE Marquedit*, Appeal Court of Paris, 15th May 1987 in Rev. Arb.1987. 503 comment Zollinger
- *Australia Esso Australia Ressources v The Honourable Plowman* [1994] 1 VR 1
- *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 985
- *Bomar Oil N.V v E.T.A.P.*, Appeal Court of Paris, 20th January 1987 in JDI 1987. 934 comment Loquin
- *Buchan v Melville* (1902) 4F 620
- *Calder v Mackay* (1860) 22D SC 741
- *Caledonian Railway Co v Magistrates of Glasgow* (1897) 25 R 74
- *Cam v Cotunav*, Cour de Cassation, chambre civile 1, 18th March 1980 JDI 1980. 874 comment Loquin
- *Chilton v Saga Holidays Plc* [1986] 1 All ER 841
- *Christison's Tr v Callender-Brodie* (1906) 8F 928
- *Christopher Brown v Genossenschaft Österreichischer Waldbesitzer* [1954] 1 QB 8
- *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1992] 2 All ER 609
- *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All ER 664
- *Compagnie Financière et Commerciale v Peruvian Guano Co* (1882) 11 QBD 55
- *Consorts Mulliez v Ruckstuhl et autre*, Appeal Court of Paris, 9th November 1993 in Role Général 93. 4719
- *Coumet es Qualité er Ducler v Société Polar-Rakennusos A Keyhtio*, Appeal Court of Paris, 8th March 1990 in Rev. Arb.1990. 625 Comment Mayer
- *CTIP v Ferich International Ltd*, Appeal Court of Paris, 21st March 1986 in Rev. Arb.1991. 350 comment Moitry and Vergne
- *Compagnie d'Assurances la Foncière v Villain*, Cour de Cassation, chambre des requêtes, 7th March 1888 in D.1889.32
- *Coffe v Garantie Mutuelles des fonctionnaires*, TGI of Paris, 2nd January 1984 in Rev. Arb.1985. 88.
- *Cons. Péliissier Du Besset v The Algiers Land and Warehouse Company Ltd*, Cour de Cassation, Chambre Civile, 17th May 1927 in D. 1928.25 comment Capitant
- *Dallal v The Islamic Republic of Iran* 3 IRAN-US CTR (1983)10
- *Dame Levrain & Veuve Hamby v Epoux Ferté*, Cour de Cassation, chambre des requêtes, 30th January 1855 in D.1855.57
- *Dame Krebs Veuve Czerefkow v Milton Stern Et Autres*, Cour de Cassation, chambre civile 2, 17th November 1976 in D.1978. 310 comment Robert

- *Deutsche Schachtbau-Und-Tiefbohrgesellschaft v R'as Al Khaimah National Oil Co and another appeal* [1987] 2 All ER 769.
- *Dolling-Baker v Merrett* [1990] 1 WLR 1205
- *Dukes v Roy* (1869) 7M 357
- *Earl of Dunmore v M'Inturner* (1829) 7 S 595
- *Earl of Hopetoun v Scots Mines and Co* (1856) 18 D 739
- *European Country Hotel Ltd v Legrand et autres*, TGI of Paris, 10th May 1990 in Juris Class. 1991.25 Number 1066-1
- *European Country hotels v Legrand et autres*, unpublished, 10th may 1990 in Juris Class. 1991.17 Number 1066-1
- *Ferrier v Alison* (1843) 5D 456
- *Fleming v Wilson & M'Lellan* (1827) 5 S 906
- *Fleming's Trustees v Henderson* 1962 SLT 402
- *Fletamentos Maritimos S.A v Effjohn International* [1995] 1 Lloyd's Rep. 311
- *Ganz v Sté Nationale des Chemins de Fer Tunisiens*, Appeal Court of Paris, 29th march 1991 in Rev. Arb.1991. 478 comment Idot
- *Ganem v Ajalbert*, Appeal Court of Paris, 10th November 1989 in Rev. Arb.1991. 651 comment Pellerin
- *GIGA v Société La Margeride et autres*, Appeal Court of Paris, 13th January 1984 in Rev. Arb.1984. 530 comment Bernard.
- *Gosset v Carapelli, Cour de Cassation*, chambre civile 1, 7th May 1963 in D.1963. 545 Comment Robert.
- *Graham House Investments Ltd v Secretary of State for the Environment* 1985 SLT 502
- *Graine d'Elite clause v Gerin, Cour de Cassation*, 14th November 1990 in Rev. Arb.1991. 75
- *Guandong Agriculture Company ltd v Conagra International (Far East) Ltd* [1993] Arb. Disp. Res. Law Journal 101
- *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyds' Rep. 455
- *Hetch v Société Buismans*, Appeal Court of Paris, 13th December 1975 JDI 1977. 107 comment Loquin
- *Heyman v Darwin Ltd* [1942] AC 356
- *Hiscox v Outhwaite* [1992] AC 562
- *Honeybun v Harris High* [1995] 1 NZLR 64
- ICC case 1526 in JDI 1974. 915 comment Derains
- ICC case 3896 in JDI 1983. 914 comment Jarvin
- ICC case 4126 in JDI 1984. 934 comment Jarvin
- ICC case 4381 in JDI 1986. 1103 comment Derains
- ICC case 4998 in JDI 1986. 1139 comment Jarvin
- ICC case 5065 in JDI 1987. 1039 comment Derains
- *Indian Oil Corporation v Coastal (Bermuda) Ltd* [1990] 2 Lloyd's Rep. 407
- *Irredelco International Corp. (USA) v Societes Etablissements M. Sebin et autres*, 6th July 1990 in Juris Class. 1991.17 Number 1066-1
- *John Mac Gregor (constructors) Ltd v Grampian Regional Council* 1991 SLT 136
- *Jones v Sherwood Computers Services* [1992] 1 WLR 277
- *Johnson v Gill* 1978 SC 74
- *Laboratoires Simone Malher v Becq*, Appeal Court of Paris, 1st December 1987 in Rev. Arb.1989. 236 comment Devolve.
- *Longmuir v Sloan* (1840) 2 D 877
- *Kuwait Foreign Trading Contracting & Investment Company v Société Icori Estero SPA & Société Lombardini Estero SPA* in JDI 1997. 151 comment Loquin
- *M v Independent Newspapers* [1992] ERNZ 202

- *M'Larry v Aikman* 1939 SC 222
- *Mac Laughlan & Brown v Morrison* (1900) O.H 8 SLT 279
- *Mac Millan v Free Church* (1862) SC 24D 1282
- *Mackenzie v Clark* (1828) 7 S 215
- *Mackenzie v Girvan* (1840) 3 D 318
- *Maggini v Gormy*, Appeal Court of Paris, 20th June 1989 in Rev. Arb.1992. 85 comment Arnaldez
- *Marc Rich & Co.A.G v Societa Italiana Impianti P.A* (The Atlantic Emperor) [1992]1 Lloyd's Rep.624
- *Marscaldi v Donyo*, Appeal Court of Paris, 2nd February 1988 in Rev. Arb.1989. 62 comment Couchez
- *Mc Callum v Robertson* (1825) 4 S 66
- *Meunier v Electricité de France*, Appeal Court of Lyon, 12th October 1953 in D.1953.709
- *Micheli v Marakiano et autres*, Rouen, 5th June 1889 in D.1891.98
- *Mitchell v Cable* (1848) 10D 1297
- *Mitchell-Gill v Buchan* 1921 SC 390
- *Municipality of Almelo and Others v Energiebedrijf Ijsselmij NV* [1994] 4 ECR 1508
- *Napier v Wood* (1844) 7 D 166
- *Nedjar v Benoliel*, Appeal Court of Paris, 21st February 1989 in D.IR.1989.81
- *Ollagon v Ste Engetel Siemephone et autre, Cour de Cassation*, chambre civile, 12th December 1984 in Rev. Arb.1986. 263 comment Mayer
- *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekeringrn* [1962] 2 Lloyd's Rep. 257
- *Overseas Insurance Co. Ltd v Mentor Insurance Co. Ltd* [1989] 1 Lloyd's Rep. 473
- *Paul Smith Ltd v H & S Interntional Holding Co Inc* [1991] 2 Lloyd's Rep.127
- *Philip Alexander Securities and Trustees Limited v Bamberger and others* 1996 QBD 11
- *Pollich v Heatley* (1910) SC 469
- *Proux v Guerton*, Appeal Court of Paris, 27th October 1988 in Rev. Arb.1990. 908 comment Moreau
- *Raffineries Pétrole D'Homs et de Banias v Chambre de Commerce Internationale*, 15th May 1985 in Rev. Arb.1985. 147
- *République Arabe d'Egypte v Southern Pacific Properties Limited et Southern Pacific Properties (Middle East)*, Appeal Court of Paris, chambre suppl.1, 12th July 1984 in JDI 1985. 130 comment Goldman
- *République de Guinée v Chambre Arbitrale de Paris et autres*, TGI of Paris, chambre 1 section 1, 30th May 1986 in Rev. Arb.1987. 371
- *République Islamique d'Iran v Société Framatome et autres and O.E.A.I et autres v Eurodif et autres*, Cour de Cassation, chambre civile 1, 20th March 1989 in Rev. Arb.1989. 653
- *Reverdy et autres v Courthéoux*, Appeal Court of Paris, 26th January 1988 in Rev. Arb.1988. 307 comment Jarroson
- *Ridge v Baldwin* [1964] A.C 40
- *Roses v Moller et Cie, Cour de Cassation*, 27th July 1937 in JDI.1938.86
- *S.C.I Le Panorama v Société Immobilière et Mobilière du Tertre, Cour de Cassation*, chambre civile 3, 20th December 1982 in Rev. Arb.1986. 233 comment Couchez
- *S.N.C Raoul Duval v Société Merkura Sucden*, Appeal Court, 2nd July 1992 in Role Général 91-23 494 and 91-22 904
- *SA Coppée Lavalin v Ken Ren Chemicals and Fertilizers Ltd* (H.L.(E)) [1995] A.C 38
- *SA Hannover International et autre v Société Uni Europe*, Appeal Court of Paris, 18th November 1993 in Role Général 92 6536
- *Sanderson v Armour and Co* 1922 S.C117
- *Société A v W*, TGI of Paris, 21st February 1983 in Rev. Arb.1983.479

- *Société Alpha Transports et autre v Société VOOF Marleen Cool Trans*, Cour de Cassation, Chambre civile1, 2nd May 1990 in Rev. Arb.1991. 285 comment Loquin
- *Societe Andree und Wilkerling Kommanditgesellschaft v Leboeuf et autres*, Appeal Court of Paris, 21th February 1984 in Rev. Arb.1986. 65 comment Fouchard
- *Société Anhydro v Société Caso Pillet et autres*, Cour de Cassation, chambre civile1, 7th June 1989 in Rev. Arb.1992. 61 at 66.
- *Société Annahold BV et autres v SA L'Oreal et autres*, Appeal Court of Paris, 9th April 1992 in D.IR.1992.173
- *Société Aranella v Société Italo-Ecuadoriana*, Appeal Court of Paris, 26th April 1985 in JDI 1986.179 comment Jacquet
- *Société BKMI Industriean Lagen et Siemens v Dutco Construction*, 5th May 1989 in Rev. Arb.1989. 723 comment Bellet
- *Société BKMI Industriean Lagen et Siemens v Dutco Construction*, Cour de Cassation, chambre civile1, 7th January 1992 in Rev. Arb.1992. 470 comment Bellet
- *Société Chayapon Rice Ltd v Société Ipitrade International*, TGI of Paris, 14th October 1985 Rev. Arb.1987. 179 comment Fouchard
- *Société des Maisons Florilège, M Torre, Société Florilège Gamma Sud, Société SATEC Cassou Bordas v M Dupre et Société La Pyramide*, Cour de Cassation, chambre commerciale, 3rd January 1985 in Rev. Arb.1986. 263 comment Mayer
- *Société Engrais de Saint-Wandrille "E.S.W" v Société Trans Agricultural Investment "T.A.I"*, Appeal Court of Rouen, chambre civile 2, 7th May 1986 in Rev. Arb.1986. 565 comment Couchez
- *Société Entreprise Chagnaud v Société Arcole*, Appeal Court of Paris, 17th October 1991 in Role Général 90-14833
- *Société Freyssinet International v Consorts Renardet*, Appeal Court of Paris, 28th February 1992 in Rev. Arb. 1992. 649 comment Cohen
- *Société Gas Del Estado v Société Ecofia et ETPM*, Appeal Court of Paris, 11th February 1988 in Rev. Arb. 1989. 683 comment Zollinger
- *Société Groupe SOGEI v Société LEP International*, Appeal Court of Paris, 19th October 1990 in Rev. Arb. 1991. 364 comment Moreau
- *Société Hostin Armes Blanches v Société Prieur Sports*, Cour de Cassation, chambre civile 2, 18th May 1989 in Rev. Arb.1990. 903 comment Moreau
- *Société Immoplan v Société Mercure*, Appeal Court of Paris, 19th January 1990 in Rev. Arb.1991. 125 comment Moitry and Vergne
- *Société Impex v Société Malteria Adriatica*, Appeal Court of Colmar, 29th November 1968 in Rev. Arb.1968. 149
- *Société Industrielle d'Acide Phosphorique et d'Engrais (SIAPE) v Société Industrie Engrais Commerce (IEC)*, Appeal Court of Paris, chambre 1A, 14th May 1986 in Rev. Arb.1986.565 comment Couchez
- *Société Intercontinental Hotels N.V v Société Istanbul Turizm Ve Otelcil*, Appeal Court of Paris, 18th November 1983 in Rev. Arb.1987. 77 comment Bernard
- *Société Korsnas Marma v Société Durand-Auzias*, Appeal Court of Paris (1chambre urg.), 30th November 1988 in Rev. Arb.1989.691 comment Tschanz.
- *Société Maeght v Société Galerie Maeght-Lelong*, TGI of Paris, 21st February 1986 in Rev. Arb.1986. 575 comment Couchez
- *Société Matra v Société Alkan*, Appeal Court of Paris, 28th April 1988 in Rev. Arb.1989. 280 comment Idot
- *Société Nationale des Entreprises de Presse v Société Le Petit Méridional*, Appeal Court of Paris, 26th May 1983 in Rev. Arb.1984. 390 comment Bernard.
- *Société Philip Brothers v Société Drexel et autre*, Cour de Cassation, chambre civil 2, 22nd November 1989 in Rev. Arb.1990 .142 comment Guinchard.

- *Société Philip Brothers v Société drexel et autres*, TGI of Paris, 1ere chambre suppl., 24th November 1989 in Rev. Arb.1990. 176 (3rd judgement) comment Kahn.
- *Société Philip Brothers v Société drexel et autres*, TGI of Paris, 14th June 1989, in Rev. Arb.1990. 147
- *Société Philip Brothers v Société Drexel et autres*, TGI of Paris, 29th June 1989 in Rev. Arb.1990. 506
- *Société Phocéenne de Dépôt (SPD) v Société Dépôts Pétroliers de Fos (DPF)*, Appeal Court of Paris, 20th January 1989 in Rev. Arb. 1989. 280 comment Idot
- *Société R.E.D.E.C et Pharaon v Société Uzinexport Import et Chambre de Commerce Internationale*, TGI of Paris, 13th July 1988 in Rev. Arb.1989. 97 comment Bellet.
- *Société SECAR v Société Shopping Décor, Cour de Cassation*, chambre civile3, 9th October 1984 in Rev. Arb.1986. 263 comment Mayer
- *Société SNC-MBE et Cie v Société Fimotel*, Appeal Court of Paris, 18th April 1989 in Rev. Arb.1990. 915 comment Moitry and Vergne
- *Société Socimer v Société Unidaf, Cour de Cassation*, chambre civile 1, 4th December 1990 in Rev. Arb.1991.81 comment Fouchard
- *Société Spadem v Société ADAGP*, Appeal Court of Paris, 22nd March 1990, in Rev. Arb.1991.123 comment Moitry and Vergne.
- *Société Sporprom Services B.V v Société Polyfrance Immo*, Appeal Court of Paris, 18th January 1983 in Rev. Crit. DIP 1984 p87 comment Mayer
- *Société Swiss Oil Corporation v Société Petrogab et République du Gabon*, Appeal Court of Paris, 16th June 1988 in Rev. Arb.1989. 309 comment Jarrosson
- *Société Total Chine v Société EMH et GSC, Appeal Court of Paris*, 28th June 1988 in Rev. Arb.1989. 328 comment Pellerin
- *Société Touraine Air Transport v Société de Droit Danois Danis Aero Lease*, Appeal Court of Paris, 23rd June 1983 in Role Général J 14249
- *Société Z.O.P et autres v Société F.T.P*, Appeal Court of Paris, 1chambre suppl., 12th March 1987 in D.IR. 1987. 97
- *Sociétés Omnium de Travaux and Cart Trade Group v République de Guinée et autres*, 12th January 1988 in Juris Class.1991.17 Number1066-1
- *Sociétés TAI, ESW, IEC et autres v Sociétés SIAPE et EG*, Appeal Court of Paris, 2nd June 1989 in Rev. Arb.1991. 87 comment Reymond
- *Southern Pacific Properties Limited et Southern Pacific Properties (Middle East) v Arab Republic of Egypt, Cour de Cassation*, 6th January 1987 26 ILM (1987) 1004
- *Stern v Air Afrique*, TGI, 2nd April 1981 in Rev. Arb.1983.191 comment Fouchard
- *Stewart v Williamson* 1909 SC 1254
- *Stewart v Williamson* 1910 SC (HL) 47
- *Sutcliffe v Thackrach and others* [1974] AC 727
- *Sykes v Fine Fair* [1967] 1 Lloyd's Rep. 53
- *Tardieu v Société Bourdon, Cour de Cassation*, chambre civile1, 7th October 1980 in Rev. Crit. DIP.1981.313 comment Maestre
- *Tennent v MacDonald* (1836) 14 S 976
- *The Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662
- *Thomson v Corporation of Glasgow* 1962 SC 36
- *Tribunal arbitral v Société Bachmann and République d'Irak*, 3rd June 1988 in Juris Class. 1991.17 Number 1066-1
- *Ury v Société Anonyme des Galeries Lafayette, Cour de Cassation*, 13th April 1972 D.1973. 2
- *Viales v Lecasble, Cour de Cassation*, chambre commerciale, 28th January 1959 in Bulletin Cass. 1959.56 Number 51
- *Vitali v Maindrault*, Appeal Court of Paris, 10th December 1985 in Rev. Arb.1987. 157 comment by M. Rondeau-Rivier.

- *Mondeil v J. De Ligault*, Appeal Court of Paris, 20th March 1986 in Rev. Arb.1991. 82
comment Moreau

Appendix 6 : Bibliography

- Books

ABERCROMBIE BAKER S. & DAVIS M.D. *The UNCITRAL Arbitration Rules in Practice : The Experience of the Iran-U.S. Claims Tribunal* (Kluwer Law & Taxation Publishers Deventer Boston 1992)

ARISTOTE *Rhétorique*

ARNALDEZ J.J. & DERAIS Y. & JARVIN S. *Collection of ICC Awards 1986-1990* (ICC Publishing SA Paris - New York and Kluwer Law & Taxation Publishers Deventer Boston 1994)

BELL J. M. *Treatise on the Law of Arbitration in Scotland* (T&T Clark Edinburgh 1877)

BERGER K.P. *International Economic Arbitration* (Kluwer Law & Taxation Publishers Deventer Boston 1993)

BERNSTEIN R. & WOOD D. *Handbook of Arbitration Practice* (2nd edition Sweet & Maxwell London 1993)

BOSCH A. (editor) & FARNSWORTH J. *Provisional Remedies in International Commercial Arbitration : A Practitioner Handbook* (Walter de Gruyter Berlin & New York 1994)

BROWN H. & MARRIOTT A. *ADR Principles and Practice* (Sweet & Maxwell London 1993)

CATO M. *Arbitration Practice Procedure : Interlocutory and Hearings Problems* (Lloyd's of London Press Limited 1992)

CRAIG W.L. & PARK W.W. & PAULSON J. *International Chamber of Commerce Arbitration* (2nd edition ICC Publishing SA Paris 1990)

CREPIN S. *Les Sentences Arbitrales devant le Juge Français : Pratique de l'Exécution et du Contrôle depuis les Réformes de 1980-81* (édition LGDJ Paris 1995)

DAC Report (British Crown Copyright 1989)

DADOMO C. & FARRAN S. *The French Legal System* (2nd edition Sweet & Maxwell London 1996)

DAVID R. *Arbitration in International Trade* (Kluwer Law & Taxation Publishers 1985)

DAVID R. *L'Arbitrage dans le Commerce International* (Economica 1982)

DAVIDSON F.P. *International Commercial Arbitration Scotland and the UNCITRAL Model Law* (W Green / Sweet & Maxwell Edinburgh 1991)

DAVIDSON F.P. *The Practice of Arbitration in Scotland 1986-1990* (Crown Copyright 1993)

DE BOISSESON M. *Le Droit Français de l'Arbitrage Interne et International* (édition Joly 1990)

DERAIS Y. & JARVIN S. *Collection of ICC Awards 1974-1985* (ICC Publishing SA Paris - New York and Kluwer Law & Taxation Publishers Deventer Boston 1990)

DORE I. *The UNCITRAL Framework for Arbitration in Contemporary Perspectives* (Graham & Trotam and Martinus Nijhoff London 1993)

EIJSSVOOGEL P.V. (editor) *Evidence in International Proceedings* (Graham & Trotam Martinus Nijhoff and Association des Jeunes Avocats 1994)

Encyclopédie Dalloz (édition Dalloz Paris 1985)

ERSKINE J. *An Institute of the Law of Scotland* (9th edition 1871)

Etudes Offertes à Pierre Bellet (édition Litec Paris 1991)

FOUCHARD P. & GAILLARD E. & GOLDMAN B. *Traité de l'Arbitrage Commercial International* (édition Litec 1996)

- GALVADA C. & DE LEYSSAC C.** *L'Arbitrage* (édition Connaissance du Droit Dalloz Paris 1993)
- GRIVART DE KERSTRAT F. & CRAWFORD W.E.** *New Code of Civil Procedure in France* (Oceana Publication Inc. Dobbs Ferry New York 1978)
- GUILD D.A.** *Law of Arbitration in Scotland* (Green & Son Ltd Edinburgh 1936)
- HARRIS B. & PLANTEROS R. & TECKS J.** *The Arbitration Act 1996 : A Commentary* (Blackwell Science & The Chartered Institute of Arbitrators London 1996)
- HOLTZMANN H. & NEUHAUS J.** *A Guide to UNICTRAL Model Law* (Kluwer Law & Taxation Publishers Deventer Boston 1989)
- HUMBERT J. & GERNET L.** *Démosthène : Plaidoyers Politiques* (édition Collection des Universités de France Les Belles Lettres Paris 1959)
- HUNTER R.** *The Law of Arbitration in Scotland* (T&T Clark Edinburgh 1987)
- IRONS J.C. & MELVILLE R.D.** *Treatise on the Law of Arbitration in Scotland* (Green & Son Ltd Edinburgh 1903)
- JARROSSON C.** *La Notion d'Arbitrage* (édition LGDJ Paris 1987)
- LARGUIER J.** *Procédure Civile : Droit Judiciaire Privé* (12th edition Mémentos Dalloz Paris 1991)
- LEW J.D.M.** (editor) *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers & School of International Arbitration Centre for Commercial law Studies Queen Mary College 1987)
- Lexique des Termes Juridiques* (édition Dalloz Paris 1985).
- MACKIE K.** (editor) *A Handbook of Dispute Resolution : ADR in Action* (Routledge in association with Sweet & Maxwell London 1991)
- MERKIN R.** *Arbitration Law* (Lloyd's of London Press Limited London 1997)
- MUSTILL M. & BOYD S.** *The Law and Practice of Commercial Arbitration in England* (Butterworths London and Edinburgh 1989)
- PARRIS J.** *Arbitration : Principles and Practice* (Granada Publishing 1983)
- PERROT R.** *Institutions Judiciaires* (7th edition Monchrestien Paris 1995)
- PLANIOU M. & RIPERT G.** *Droit Civil* (édition LGDJ 1954)
- REDFERN A. & HUNTER M.** *Law and Practice of International Commercial Arbitration* (2nd edition Sweet & Maxwell London 1991)
- Report of the Scottish Advisory Committee on Arbitration Law : Report to the Lord Advocate on the UNCITRAL Model Law on International Commercial Arbitration* (1989)
- ROBERT J. & MOREAU B.** *L'Arbitrage : Droit Interne, Droit International Privé* (édition Dalloz Paris 1993)
- ROWLAND P.** *Arbitration : Law and Practice* (Sweet & Maxwell and The Institute of Chartered Arbitrators London 1988)
- RUTHERFORDS M. & SIMS J.** *Arbitration Act 1996 : A Practical Guide* (FT Law & Tax Pearson Professional London 1996)
- Stair Memorial Encyclopedia* (The Law Society of Scotland Butterworths Edinburgh 1988 Volume 2)
- SUTTON D. & KENDALL J. & GILL J.** *Russell on Arbitration* (Sweet & Maxwell London 1997)
- THIERER A.** *Judgement Day : The Case for ADR* (Imediaprint Limited London 1992)
- THOMAS D.R.** *The Law and Practice relating to Appeals from Arbitral Awards* (Lloyd's of London Press Ltd 1994)
- VAN DER BERG A.J.** *The New York Convention of 1958 : Towards a Uniform Judicial Interpretation* (TMC Asser Institute The Hague and Kluwer Law & Taxation Publishers Deventer Boston 1994)
- VINCENT J. & GUICHARD S.** *Procédure Civile* (édition Dalloz Paris 1991)

WALTON A. & VITORIA M. *Russel on the Law of Arbitration* (20th edition Stevens & Son Ltd London 1982)

WEIR M.E. *A Synopsis of the Law of Arbitration in Scotland* (Weir Edinburgh 1979)

WILKINSON J. *ADR Practice Book* (Wiley Law Publication 1990)

WOOG J.C. *La Pratique Professionnelle de l'Avocat* (2nd edition Litec & Gazette du Palais 1991)

• Articles

ARNALDEZ J.J. & SCHAFFER E. Le Règlement de Référé Pré-Arbitral de la CCI (en vigueur depuis le 1er Janvier 1990) in *Rev. Arb.* 1990. 835

ARNALDEZ J.J. L'Acte Déterminant la Mission de l'Arbitre in *Etudes Offertes à Pierre Bellet* p1

BADINTER R. L'Impartialité de l'arbitre in *Petites Affiches* 1991. 5

BELLET P. & MEZGER E. L'arbitrage International dans le Nouveau Code de Procédure Civil in *Rev. Crit. DIP* 1981. 16

BELLET P. Le juge Arbitre in *Rev. Arb.* 1980. 394

BENTIL K.J. Making England a more Attractive Venue for International Commercial Arbitration by less Judicial Oversight in 5 *Journal Int. Arb.* 1988. 49

BERG A. Ousting the Jurisdiction in 109 *Law Quat. Rev.* 1993.35

BERG A. Ousting the Jurisdiction in 109 *Law Quat. Rev.* 1993. 385

BINGHAM Lord Reasons and Reasons for Reasons : Difference between a Court Judgement and an Arbitral Award in *Arb. Int.* 1988. 139

BLESSING M. International Arbitration Procedures in *Int. Bus. Law.* 1989. 411

BLESSING M. The ICC Arbitral Process : The Procedures before the Arbitral Tribunal in *ICA Bulletin* 1992 p23

BLESSING M. Choice of Substantive law in International Arbitration in 14 *Journal Int. Arb.* 1997. 39

BOISSESON DE M. Réflexions sur l'Espace et le Temps dans l'Arbitrage International in *Etudes Offertes à Pierre Bellet* (édition Litec Paris 1991) p33

BOLARD G. Les juges et les Droits de la Défence in *Etudes Offertes à Pierre* p49

BOND S. Letter to Mr Mealey in 11 *Arb. Int.* 1995. 274

BOND S. The Selection of the ICC Arbitrators and the Requirement of Independence in 4 *Arb. Int.* 1988. 300

BORRA P. L'utilisation de la médiation en France in *The Colloquium of the Franco British Lawyers Society : Justice and Money* September 1997

BOURQUE J.F. Ten Years of ICC Arbitration 1983-1992 : A Statistical Survey in 4 *ICA Bulletin* 1993. 3

BOYD S & VEEDER V.V. Le Développement du Droit Anglais de l'Arbitrage depuis la Loi de 1979 in *Rev. Arb.* 1991.209

BREDIN J.D. Le Secret du Délibéré Arbitral in *Etudes Offertes à Pierre* p71

BRUNA S. Control of Times-limits by the International Court of Arbitration in 7 *ICA Bulletin* 1996. 72

BYRNE D. Payment of Advances on Fees to Arbitrators in ICC Proceedings in 7 *ICA Bulletin* 1996. 84

CADIET L. La Renonciation à se Prévaloir des Irrégularités de la Procédure Arbitrale in *Rev Arb.* 1996.3

CARBONNEAU T.E. Arbitral Adjudication in 19 *Texas Int. Law Journal* 1984. 82

CARBONNEAU T.E. Etude Historique et Comparée de l'Arbitrage : Vers un Droit Matériel de l'Arbitrage Commercial International fondé sur la Motivation des Sentences in *Rev. Int. Droit Comp.* 1984. 727

- CERINA P.** Interests as Damages in International Commercial Arbitration in 4 Am. Rev. Int. Arb. 1993. 255
- CLERE J.** L'Arbitrage Révolutionnaire : Apogée et Déclin d'une Institution in Rev. Arb. 1981.3
- COHEN D.** La Soumission de l'Arbitrage International à la Loi Française in Rev. Arb. 1991.155
- CORNU G.** La Présentation d'une Réforme de 1980 in Rev. Arb. 1980.583
- CORNU G.** Le Juge Arbitre in Rev. Arb. 1980. 373
- CORNU G.** Les Modes Alternatifs de Règlements des Conflits : Rapport de Synthèse in Rev. Int. Droit Comp. 1997. 313
- CORNU G.** Les Principes Directeurs du Procès Civil Par Eux Mêmes in *Etudes Offertes à Pierre Bellet* p83
- CRAIG L.W.** Some Trends and Developments in the Laws and Practice of International Commercial Arbitration in 30 Texas Int. Law Journal 1995. 1
- CRAIG W.L. & PARK W. W. & PAULSSON J.** French Codification of Legal Framework for International Commercial Arbitration : the Decree of May 12th 1981 in 13 Law & Policy 1981.727
- CREPIN S.** Le contrôle des Sentences Arbitrales par la Cour d'Appel depuis la Réforme de 1980-81 in Rev. Arb. 1991.557
- DARMON M.** La Médiation Conventionnelle : un Mode Alternatif de Règlement des Litiges in JCP. 1996. D. 3976. 437
- DAVENPORT B.** The New English Draft Arbitration Bill in 10 Arb. Int. 1991. 163
- DAVIDSON F.P.** The Relationships between Arbitration and the Courts in England and Scotland in 12 Civil Quarterly 1993. 372
- DAVIS B. & LAGACE GLAIN O. & VOLKOVITSCH M.** When Doctrines Meet : Fast-Track Arbitration and the ICC Experience in 10 Journal Int. Arb. 1993. 69
- DAVIS B.** Fast Track Arbitration : Different Perspectives in 3 ICA Bulletin 1992. 4
- DAVIS B.** Fast Track Arbitration and Fast Tracking Your Arbitration in 9 Journal Int. Arb. 1992. 43
- DAVIS B.** The ICC Pre Arbitral Referee Procedure in context with Technical Expertise Conciliation and Arbitration in 9 Int. Cons. Law Rev. 1992. 218
- DEPARMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW 1996 REPORT**
- DEPARMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW 1997 REPORT**
- DERAINS Y.** Intérêts Moratoires, Dommages-Intérêts Compensatoires et Dommages Punitifs devant l'Arbitre International in *Etudes Offertes à Pierre Bellet* p101
- DERAINS Y.** Le Processus Arbitral de la CCI : VIIIème partie : Le Choix du Droit Applicable au Contrat et l'Arbitrage International in 6 ICA Bulletin 1995. 10
- DERAINS Y.** Les Tendances de la Jurisprudence Arbitrale Internationale in JDI 1993. 829
- DESMARAIS J.** Les Modes Alternatifs de Règlements de Conflits en Droit du Travail in Rev. Int. Droit Comp. 1997. 409
- DEVOLVE J.L.** Essai sur la Motivation des Sentences Arbitrales in Rev. Arb. 1989.149
- DEVOLVE J.L.** L'Intervention du Juge dans le Décret du 14.5.1980 in Rev. Arb. 1980. 607
- DEVOLVE J.L.** Vraies ou Fausses Confidences ou les Petits et les Grands Secrets de l'Arbitrage in Rev. Arb. 1996. 373
- DONOVAN F.P.** Dissenting Opinions in 7 ICA Bulletin 1996. 76
- DRAI P.** Libres Propos sur la Médiation Judiciaire in *Etudes Offertes à Pierre* p123
- FLECHEUX G.** Le Droit d'Etre Entendu in *Etudes Offertes à Pierre* p149
- FONTAINE M.** Le Processus Arbitral CCI : VIème partie La Sentence : La Rédaction de la Sentence du point de vue d'un Juriste de Droit Continental in 5 ICA Bulletin 1994. 30

FOUCHARD P. Final Report on the Status of the Arbitrator ICC Commission on International Arbitration in 7 ICA Bulletin 1996. 28

FOUCHARD P. Introduction : Spécificité de l'Arbitrage International in Rev. Arb. 1981.449

FOUCHARD P. L'Arbitrage International en France après le Décret de 1981 in JDI 1982.379

FOUCHARD P. L'Arbitrage International en France après le Décret du 12 mai 1980 in JDI 1982. 374

FOUCHARD P. La Coopération du Président du TGI à l'Arbitrage in Rev. Arb. 1985. 11

FOUCHARD P. Le Statut de l'Arbitre dans la Jurisprudence Française in Rev. Arb.1996. 325

FOUCHARD P. Vers une Réforme du Droit Français de l'Arbitrage ? in Rev. Arb.1992. 199

GAILLARD E. Le Principe de Confidentialité de l'Arbitrage Commercial International in D.1987.153

GLOSSNER O. Arbitration : A Glance Into History in *Hommage à F. Eisemann* 1978 p19

GOLDMAN B. Instance Judiciaire et Instance Arbitrale Internationale in *Etudes Offertes à Pierre Bellet* p219

GOLDMAN B. La Volonté des Parties et le Rôle de l'Arbitre dans l'Arbitrage International in Rev. Arb. 1981. 471

HASCHER D. La Pratique de la CCI en matière de Nomination, Confirmation, Récusation, Remplacement d'Arbitres in 6 ICA Bulletin 1995. 4

HERRMAN Dr. The Draft English Bill : Pulling the Wrong Punches in 10 Arb. Int. 1991. 185

HETSCH P. L'Arbitrage en Droit Communautaire in 6 ICA Bulletin 1995.46

HORY A. Mesures d'Instruction in Futurum et Arbitrage in Rev. Arb. 1996.191

HUET A. Les Procédures de Reconnaissance et d'Execution des Jugements Etrangers et des Sentences Arbitrales en Droit International Privé in 115 JDI 1988.19

HUNTER M. & PAULSSON J. A Code of Ethics for Arbitrators in International Commercial Arbitration in 13 Int. Bus. Lawyer 1985. 153

HUNTER M. Final Report on Dissenting and Separate Opinions in ICA Bulletin 1991. 32

ICC COMMISSION ON INTERNATIONAL ARBITRATION : Working Parties on the Revision of the ICC Rules of Arbitration December 1995 unpublished Document 420/344

ICC COMMISSION ON INTERNATIONAL ARBITRATION : Working Parties on the Revision of the ICC Rules of Arbitration Meeting of Décembre 1996 unpublished Document 410/14 752

ICC COMMISSION ON INTERNATIONAL ARBITATION : Working Parties on the Revision of the ICC Rules of Arbitration unpublished Document 420/350

ICC COMMISSION ON INTERNATIONAL ARBITATION : Working Parties on the Revision of the ICC Rules of Arbitration Meeting of December 1996 unpublished Document 420/355

JARROSSON C. Le Rôle Respectif de l'Institution de l'Arbitre et des Parties dans l'Instance Arbitrale in Rev. Arb. 1990. 380

JARROSSON C. Les Modes Alternatifs de Règlements de Conflits : Présentation Générale in Rev. Int. Droit Comp. 1997. 325

JARROSSON C. Réflexions sur l'Impérisme in *Etudes Offertes à Pierre Bellet* p245

JARVIN S. Le Processus Arbitral CCI : Vème partie : Le Lieu de L'Arbitrage in 4 ICA Bulletin 1993. 7

JARVIN S. The Place of Arbitration 7 ICA Bulletin 1996. 54

KENDHALL J. Ousting the Jurisdiction in 109 Law Quat. Rev. 1993. 387

KESSEDJIAN C. Mesures Provisoires et Conservatoires : A Propos d'une Résolution Adoptée par l'Association de Droit International in JDI 1997. 103

- KREINDLER R.** Impending Revision of the ICC Arbitration Rules : Opportunities and Hazards for Experienced and Inexperienced Users Alike in 13 *Journal Int. Arb.* 1996. 45
- KUHN W.** Rectification and Interpretation of Arbitral Awards in 7 *ICA Bulletin* 1996. 78
- L'Administration d'un Arbitrage CCI** in 1 *ICA Bulletin* 1990. 1
- LALIVE P.** Avantages de l'Arbitrage Ad Hoc in *Etudes Offertes à Pierre Bellet* p301
- LARRIBAU-TERNEYRE Y.** Faut-il Réglementer la Médiation Familiale ? in *JCP* 1993 D. 3649 p65
- LE FOYER DE COSTIL H.** Le Vol d'Aigle du Juge des Référé in *Etudes Offertes à Pierre Bellet* p341
- LEURENT B.** L'Intervention du Juge in *Rev. Arb.* 1992. 303
- LEVEL S.** Joinder of Proceedings, Intervention of Third Parties and Additional Claims and Counterclaims in 7 *ICA Bulletin* 1996.36
- LOQUIN E.** L'examen du Projet de Sentence par l'Institution et la Sentence au 2ème degré : Réflexions sur la Nature et la Validité de l'Intervention de l'Institution Arbitrale sur la Sentence in *Rev. Arb.* 1990. 427
- LOQUIN E.** Le Pouvoir des Arbitres Internationaux à la lumière de l'Evolution du Droit de l'Arbitrage International in 110 *JDI* 1983.330
- MAGDELAN A.** Aspects Arbitraux de la Justice Civile Archaïque à Rome in *Rev. Int. Droits Anti.* 1980. 205
- MARRIOTT A.** The New Arbitration Bill in 11 *Int. Arb. Rep.* 1996. 20
- MARTIN R.** Quand le Grain Ne Meurt ... de Conciliation en Médiation in *JCP* 1996. 439
- Mc GOVERN D.** Scrutiny of the Award by the ICC Court in 5 *ICA Bulletin* 1994. 46
- MEULDERS-KLEIN M.T.** Les Modes Alternatifs de Règlements de Conflits en Matière Familiale : Analyse Comparative in *Rev. Int. Droit Comp.* 1997. 383
- MEZGER E.** Dix Questions Relatives au Titre VI du Livre 10 du NCPC in *Rev. Arb.* 1981.543
- MITROVIC D.** Advance to Cover Costs of Arbitration in 7 *ICA Bulletin* 1996. 92
- MORERA R.** The Appointment of Arbitrators by the Court in 7 *ICA Bulletin* 1996. 32
- MOTULSKI H.** Principes Directeurs du Procès in *D.*1972. 93
- MURRAY J.** The UNICTRAL Model Law and Judicial Control of Arbitration in Scotland in 9 *Arb. Int.* 1993. 97
- MUSTILL Rt Hon. Lord Justice.** A New Arbitration Act for the UK ? in 6 *Arb. Int.* 1990.1
- NARIMAN F.S.** Standards of Behaviours of Arbitrators in 4 *Arb. Int.* 1988. 311
- NGWASIRI C.N.** The Role of the Judge in French Civil Proceedings in *Civil Just.Quat.* 1990.167
- OKEKEIFERE A.I.** The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration in 14 *Journal Int. Arb.* 1997. 125
- OPPETIT B.** Justice Etatique et Justice Arbitrale in *Etudes Offertes à Pierre Bellet* (édition Litec Paris 1991) p415
- PAULSSON J. & RAWDING N.** The Trouble with Confidentiality in 5 *ICA Bulletin* 1994. 48
- PELLERIN J.** Les Droits des Parties dans l'Instance Arbitrale in *Rev. Arb.* 1990. 395
- PLANTEY A.** Une Politique Générale de l'Arbitrage International Est-elle Possible ? in 7 *ICA Bulletin* 1996. 15
- PLUYETTE G.** L'Intervention du Juge in *Rev. Arb.* 1992. 314
- POZNANSKI B.** The Nature and the Extent of the Arbitrator's Power in International Commercial Arbitration in *Journal Int. Arb.* 1987. 79
- RAMOZ MENDEZ F.** Arbitrage International et Mesures Conservatoires in *Rev. Arb.* 1985. 53
- Rapport Final sur les Arbitrages Multipartites in 6 *ICA Bulletin* 1995. 26

RAU A.S. & SHERMAN E.F. Tradition and Innovation in International Arbitration in Texas Int. Law Journ. 1995. 103

REDFERN A. The Jurisdiction of an International Commercial Arbitrator in Journal Int. Arb. 1986. 19

REINER A. Terms of Reference in 7 ICA Bulletin 1996. 59

REYMOND C. Civil Law and Common Law Procedure : Which is the More Inquisitorial ? A Civil Lawyer's Response in 5 Arb. Int. 1989. 357

REYMOND C. Connaissance Personnelle de l'Arbitre à son Information Privilégiée : Réflexions sur quelques Arrêts in Rev. Arb. 1991. 3

REYMOND C. Le Président du Tribunal Arbitral in *Etudes Offertes à Pierre* p 467

ROBERT J. Arbitrage en Matière Internationale in D.1981. 209

ROBERT J. Bilan d'une Réforme in Rev. Arb. 1980. 704

ROGERS A. The Hon. & MILLER D. Non Confidential Arbitration Proceedings in 71 Austral. Law Journ. Volume 1997. 436

SCHAFFER E. The ICC Arbitral Process Part II : Terms of Reference in Past and at Present in 3 ICA Bulletin 1992. 8

SCHWARTZ E. International Conciliation and the ICC in 5 ICA Bulletin 1994. 5

SCHWARTZ E. The ICC Arbitral Process : Part IV :The Costs of Arbitration in 4 ICA Bulletin 1993. 8

SCHWARTZ E. The Practices and Experiences of the ICA in Conservatory and Provisional Measures in International Arbitration Special Supplement in 4 ICA Bulletin 1993.45

SCHWARTZ E. The Rights and Duties of ICC Arbitrators in The Status of the Arbitrator Special Supplement of the ICA Bulletin 1995. 67

SCHWARTZ E. A Comment on Chromalloy Hilmarton, à l'Américaine in 14 Journal Int. Arb. 1997. 125

SMIT H. Provisional Relief in international arbitration : the ICC and other Proposed Rules in 1991 Am. Rev. Int. Arb. 1991. 388

SMIT R. An Inside View of the ICC Court in 10 Arb. Int. 1994. 53

STAUGHTON The Rt Hon. Lord Justice Written Beliefs and Oral Advocacy in 5 Arb. Int. 1989. 348

STEYN J. Towards a New English Arbitration Act in 7 Arb. Int. 1991. 17

The AAA Code of Ethics in 10 Yearbook Com. Arb. 1985. 131

The IBA Rules of Ethics in 12 Yearbook Com. Arb. 1987. 199

THIEFFRY CH. & THIEFFRY P. L'Evolution du Cadre Législatif de l'Arbitrage International dans les Années 80 in JDI 1991. 965

UFF J. & KEATING D. Should England Reconsider the UNCITRAL Model Law ? in 10 Arb. Int. 1991. 170

VAN HOUTTE H. Pour ou Contre l'ADR in 7 ICA Bulletin 1996. 77

VON MEHREN A.T. International Commercial Arbitration : the Contribution of the French Jurisprudence in Louisiana Law Rev.1986. 1040

WEIR M.E. Arbitration Procedures and the Role of the Clerk in ARBITRATION SEMINAR under the auspices of the LAW SOCIETY OF SCOTLAND 11th October 1990

WERNER J. The Trade Explosion and Some Likely Effects on International Arbitration in 14 Journal Int. Arb. 1997. 5

WETTER G. The Present Status of the International Court of Arbitration of the ICC : An Appraisal in 1 Am. Rev. Int. Arb. 1990. 91

- Conferences Publications and ICC Publications

60 Years of ICC Arbitration : A Look at the Future (ICC Publishing SA Paris 1984 Publication Number 412)

Arbitration and Expertise (ICC Institute of International Business Law and Practice 1994)

Conservatory and Provisional Measures in International Arbitration (ICC Publishing SA Paris 1993 Publication Number 519)

ICC Conference : *Conference to launch the 1998 ICC Rules of Arbitration* taking place on the 18th September 1997 at the Dorchester, Park Lane, London

Taking of Evidence in International Arbitral Proceedings (ICC The Dossier of the Institute of International Business Law and Practice Number 8 / 1989 ICC Publishing SA 1989)

The Arbitral Process and Independence of Arbitrators (ICC Publishing SA Paris 1991 Publication Number 472)

The Business Law and Practice of Dispute Disposal Conference taking place in the Holiday Inn Crown Plaza on the 13th and 14th May 1996 at Edinburgh.

The Colloquium of the Franco British Lawyers Society : *Justice and Money* at the Town House Inverness 11th to 13th September 1997.

The Reform of Commercial Arbitration Procedure Conference taking place in London on the 17th and 18th February 1994 at the Brewery

The Status of the Arbitrator Special Supplement of the Bulletin of the International Court of Arbitration of the ICC (ICC Publishing 1995 Publication Number 564)

- Information received from

Advisory Conciliation and Arbitration Service (ACAS) : 11/12 St James Square SW1Y 4LA London

Centre For Dispute Resolution (CEDR) : 100 Fetter Lane, London EC4A 1DD

Family Mediation Scotland : 127 Rose Street South Lane Edinburgh EH2 4BB

International Chamber of Commerce (ICC) : 38 Cours Albert 1er 75 008 Paris France

The Chartered Institute of Arbitrators : International Arbitration Centre 24 Angel Gate, City Road, London EC1V 2RS

- Sources found on the Internet

AAA Internet link at <http://www.adr.org/index.html>

ICC Internet link at <http://www.iccwbo.org>

LCIA Internet link at <http://www.lcia-arbitration>.

WTO Internet link at <http://www.wto.org.wto/intltrad/introduc.htm>.

- Statutes

American Arbitration Association

Arbitration (Scotland) Act 1894

Arbitration Act 1950

Arbitration Act 1975

Arbitration Act 1979

Arbitration Act 1996

Articles of Regulation 1695

Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10th June 1958

Internal Rules of the Court of Arbitration of the ICC, 1st March 1980

Iran-U.S. Claims Tribunal Consolidated Tribunal Rules of Procedure, 9th March 1983 as amended 7th March 1984

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 Section 66 and Schedule 7

Rules of Conciliation and Arbitration of the ICC, 1st January 1988

Rules of the London Court of Arbitration of International Arbitration (LCIA), 1st January 1985

The 1998 ICC Rules

The Administration of Justice (Scotland) Act 1972

The French Decree of 14th May 1980
The French Decree of the 12th May 1981
The UNCITRAL Arbitration Rules, 28th April 1976
The UNCITRAL Model Law on International Commercial Arbitration 21st June 1985